No. (1) 99 1 32 JUL 6 1999

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In The

Supreme Court of the United States

JOANNE ARMSTRONG ALLNUTT,
Petitioner,

v.

ASSOCIATES LEASING, INCORPORATED;
MILLER & MILLER AUCTIONEERS, INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in approving sale from individual's bankruptcy estate of property in which a co-owner (wife) had an interest, without compensation to the co-owner?

2. Did the Court of Appeals err in affirming without comment removal by bankruptcy court and imposition of sanctions, in case filed by counsel for wife, seeking a determination in state court of the issue of whether the client (wife of the Debtor) owned property in tenancy by the entirety that had been sold out of the husband's bankruptcy estate as husband's sole property?

3. Did the Court of Appeals err in affirming without comment the Bankruptcy Court's holding that the wife (spouse), despite the provisions of 11 U.S.C. § 363(h), (i) and (j), waived her interest in property held in tenancy by the entirety if she did not intervene in the bankruptcy court to claim that interest before the 30-day appeal period for the sale expired?

4. Did the Court of Appeals err when they affirmed without comment the Bankruptcy Court's denying subject matter jurisdiction of State Courts to resolve subsequent disputes of title to property, after it is sold out of the bankruptcy estate?

5. Did the Court of Appeals err when it affirmed without comment the bankruptcy court's holding that, since wife was an "insider", she was agent and "in privity" with the husband's litigation in or associated with his bankruptcy?

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PETITION FOR WRIT OF CERTIORARI

Tracy E. Mulligan, Esquire, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals (App. 1) without separate opinion. The District Court issued a Memorandum (App. 4) and an Order (App. 7). The Bankruptcy Court issued a Memorandum Opinion Imposing Sanctions jointly against Plaintiff and Plaintiff's Counsel in the amount of $66,929.01 (App. 9), reported at 220 B.R. 871 (Bkrtcy, D.Md. 1998); Order Granting the Chapter 11 Trustee's Motion to Intervene, Denying Motions to Remand, Granting and Deferring Motions to Dismiss, and Imposing Sanctions against Plaintiff and Plaintiff's Counsel (App. 63); and a Permanent Injunction (App. 66). The Court of Appeals issued an Order denying Petition for Rehearing and Rehearing en Banc (App. 69).

JURISDICTION

The Court of Appeals entered its judgment on March 9, 1999. On April 6, 1999 it denied petitioner's request for rehearing (App. 69).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Constitutional provisions involved are set forth in the Appendix (App. 72). Statutory Provisions involved are set forth in App. 73-80. Attention is particularly directed to 11 U.S.C. Section 363(h), (i) and (j) (App. 79-80).

STATEMENT OF THE CASE

This petition is being filed by counsel for plaintiff below to reverse the award of sanctions affirmed and imposed by the Fourth Circuit Court of Appeals against him jointly with the plaintiff for allegedly filing a case without merit solely for harassment of the purchasers from the bankruptcy estate. The plaintiff herself is completely exhausted by sanctions and worry, and has instructed me not to proceed on her behalf.

On September 27, 1996, Counsel filed on behalf of Joanne A. Allnutt, in the Circuit Court for Howard County, Maryland, a complaint in conversion and detinue against asset purchasers and some of their transferees to obtain a decision on whether Joanne was the owner as tenant by the entireties of excavating equipment and related property sold out of the individual bankruptcy estate of her husband, Fred W. Allnutt, for the sum of $6,500,000.00. The question was whether the bankruptcy court's approved sale had lawfully or unlawfully swept her assets into payment of the husband's debt. The Chapter 11 Trustee had not complied with Title 11, §363(h), (i) and (j), and had paid no compensation to wife for her interest.

Defendants removed suit to bankruptcy court. Spouse moved to remand. Chapter 11 Trustee moved to intervene. Defendants moved to dismiss complaint and to impose sanctions on spouse and her counsel.

Plaintiff's counsel opposed the motions on the grounds, inter-alia, that the Court lacked subject matter jurisdiction, that sanctions are not authorized for counsel's filing a case in State Court that was removed to the bankruptcy court, as no new pleadings had been filed by plaintiff in Bankruptcy Court; and that the requirements for investigation of facts and legal research imposed by Rule 9019 had been fully met by counsel. It was also presented that the Trustee had failed to comply with 11 U.S.C. Sections 363 (h),(i) and (j) before conveying the property; and that

Plaintiff had never been made a party, or even called as a witness in the bankruptcy, as more fully stated under "Argument", infra.

After consolidating the 3 adversary proceedings (Defendants moved separately to remove) and hearing on motions, the Bankruptcy Court, James F. Schneider, J., held that

> 1. Bankruptcy court had subject matter jurisdiction over spouse's suit;
>
> 2. Complaint was properly removed from Maryland State Court;
>
> 3. Trustee, as representative of debtor's estate, was a necessary party and would be permitted to intervene;
>
> 4. Spouse's complaint was procedurally improper;
>
> 5. Court would permanently enjoin debtor, spouse, and their "insiders", agents, and attorneys from contesting the validity of sales of estate property;
>
> 6. Spouse failed to establish that, under Maryland law, she and debtor owned assets of excavating business as tenants by the entireties;
>
> 7. Spouse's counsel committed willful and unethical conduct by bringing state-court action and later by advocating its merits in the bankruptcy court, and sanctions would be imposed against him, along with spouse, jointly and severally in the amount of $66,929.01, which constituted defendants' reasonable costs and attorneys fees.

By way of background, the Plaintiff, Joanne A. Allnutt, was a third-year high school dropout to marry a schoolmate, the Debtor, Fred Allnutt, in 1958. In 1967

Joanne and Fred had started an excavating business with the purchase of a single "Traxcavator" (with lowboy trailer and truck to tow it over the highway), cosigning the original $30,000 loan, and all notes over the years used to buy equipment for the business as it grew. Joanne had worked with her husband until 1981 or 82, throughout that time handling all of the office work, while Fred handled the equipment and obtained excavating contracts (App. 81-85). By 1982 the business had outgrown Joanne's home office, and was taken over by an administrative staff.

The Defendants were a) the purchaser of the excavating property from the bankruptcy estate, Miller and Miller Auctioneers, Inc. and b) certain parties, including Associates Leasing, Inc., known by plaintiff to have purchased some of those assets from Miller and Miller Auctioneers, and who were claiming title to the property. Associates Leasing, Inc. had purchased approximately one-half of the property sold out of bankruptcy estate from Miller and Miller Auctioneers, and were leasing it back to the Mangione group that had purchased the business of JFC (formerly owned by the Debtor) from the bankruptcy estate.

On or about 1982 Fred stopped paying income taxes, and became a "Tax Protestor". In 1992 the Internal Revenue Service seized assets and forced him into Bankruptcy. In the bankruptcy Fred filed numerous motions that were heavily criticized by the Judge.

Plaintiff's counsel had never represented Fred W. Allnutt, and did not know the Allnutts until more than a year after the subject property had been sold out of the bankruptcy estate.

The District Court, by Memorandum and Order, entered September 25, 1998, affirmed the decision of the Bankruptcy Court for the reasons stated in Judge Schneider's March 20, 1998 Opinion. (Memorandum, App. 4-6; Order App. 7-8).

The Court of Appeals by Order entered March 9, 1999 granted motions of Associates Leasing, Inc. for

sanctions in the amount of costs and attorneys fees relating only to the appeal from the district court, granted the motion for an extraordinary writ, and affirmed the judgment of the district court (App. 1-2).

The Court of Appeals, by Order entered April 6, 1999 denied Appellant's Petition for Rehearing and Rehearing En Banc (App. 69-71).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has apparently decided to vitiate the protections accorded to a spouse as a joint owner of property with a bankrupt which are set forth in 11 U.S.C. §363 (f), (h),(i) and (j) (App. 78-80) if not claimed by the Debtor (husband), and not asserted in an adversary action initiated in the bankruptcy case by the wife.

The protections are further vitiated by the holding that if the Chapter 11 trustee does not know of a co-owner's claim, he is authorized to sell the property, including the co-owner's interest, free and clear of such interest.

Sales of property by a bankruptcy trustee are governed by 11 U.S.C. Section 363 (App. 76-80). Sales of jointly held property are governed by subsections (f) - (j). (App. 78-80). These sections impose requirements on the trustee that he must meet in order to sell a co-owner's interest as a part of the whole. These sections place no requirements or duties on the co-owner.

The statute authorizes sale only if the specified conditions are met. The statute does not authorize the trustee to sell such property if he doesn't know about the co-owner's interest. It is the duty of the trustee to determine what assets the debtor has, before the contracts to sell them.

The Court of Appeals continued to vitiate the protections accorded to a spouse as joint owner of property with a bankrupt by accepting the Bankruptcy court's holding that if both the wife and husband fail to notify the bankruptcy court of their claim of "tenancy by the entireties'

ownership, they have waived their right to such exemptions, and that the failure of a co-owner to object to a trustee's notice of sale has been held to authorize a sale free and clear of all liens and encumbrances and interests, such as the interest claimed here by plaintiff. Veltman, v. Whetzal, 93 F.3d 517 (8th Cir. 1996). (App. 51). This is totally inapposite. In Veltman, both husband and wife were parties before the court. Here plaintiff was never either party or witness. The citation addresses "exemptions" in the bankruptcy case. The Plaintiff's separate interest is not subject to exemption from the debtor's assets. It is an interest that never came into the bankruptcy court in the first place. The filing of the bankruptcy petition in this case created a bankruptcy estate that included "all legal and equitable interests of the debtor in property as of the commencement of the case" 11 U.S.C. §541(a) (App. 50). The plaintiff's claim has nothing to do with the debtor's exemptions of some of his own interests.

The effect of this is that, as much as our "law hates a forfeiture", that a wife, with limited education could be deprived of her undivided assets in her husband's individual bankruptcy (including as here a multi-million dollar estate) because she did not know enough to file in the bankruptcy court an objection to the sale, because she thereby unwittingly is held to have waived her right to her interest in the property – that was not in the bankruptcy estate to start with. The statute (11 U.S.C. §363) puts no requirement on the co-owner to do anything to avoid loss of his or her interest. The interpretation adopted in this case impairs the plain language of the statute that protects the co-owner.

Court of Appeals had denied the plaintiff, a woman, the right to serious consideration of her efforts to recover some or all of her multi-million dollar estate that was taken from her without her ever being a party, or even called as a witness, in any case in which the decisions were made. Her efforts have been trivialized, and she has been sanctioned for

even questioning the validity of what is to her a multi-million dollar legal fraud.

ARGUMENT

Counsel submits that case is valid, and filed in good faith. Analysis of the case is as follows:

OWNERSHIP INTEREST OF JOANNE ALLNUTT

The Affidavit of Joanne Armstrong Allnutt sets forth facts that support the existence or inference of a joint interest, presumably tenancy by the entireties in the Property described in the Complaint, started in 1967, and continuing through to the present time. Cf. M.Lit, Inc. v. Berger, 225 Md. 241 (1961); Alexander v. Hergenroder, 226 Md. 559 (1961).

PLAINTIFF'S INTEREST WAS NOT CONVEYED IN THE BANKRUPTCY SALE

The Code protects the interests of co-owners in tenancy by the entirety by providing that the Trustee must take certain actions before the co-owner's interest can be conveyed, and provides that compensation be paid to the co-owner.

In Sumy v. Scholssberg, 777 F. 2d 921, 924 (C.A.4 (Md.) 1985) the Court of Appeals for the Fourth Circuit summarized the statutory requirements for the sale of property involving concurrent ownership by the trustee as follows:

> Section 363(f) grants the trustee the power to sell most types of estate property "free and clear of any interest in such property of an entity other than the estate, if the estate consents or under certain other

> conditions. (FN4) Section 363(h) then excepts tenancies in common, joint tenancies, and tenancies by the entirety from subsection (f)'s general provisions, providing that the trustee may sell the co-owner's interest along with the estate's interest only in more limited circumstances (FN5). If property is to be sold under Sec. 363(h), the non-bankrupt spouse has a right of first refusal, Sec. 363(i), and if the spouse does not exercise that option, the trustee must of course distribute the proceeds of sale in proportion to the respective interests of the estate and the spouse. (Sec. 363 (j)).

The Code does not place responsibility on the Co-owner to sue the trustee. The trustee must take the required actions for the co-owner's interest to convey.

DEBTOR'S PROPERTY IN THE BANKRUPTCY ESTATE

Upon the commencement of the bankruptcy case, only the debtor's interest in property becomes property of the estate, **and the estate's rights in the property are limited to the rights held by the debtor.** Cross Electric Co., Inc. v. United States. 664 F. 2d 1218 at 1220 (4th Cir. 1981).

The bankruptcy estate's rights in a debtor's property are limited to those rights had by the debtor. Matter of Jones, 768 F.2d 923 (7th Cir. 1985).

It is fundamental that the bankruptcy estate must have an interest in property as of the commencement of the case in order for the bankruptcy trustee to dispose of that interest. The Bankruptcy Trustee may only dispose of the debtor's interest in property which the debtor had as of the commencement of the estate. In re Continental Airlines, Inc. 780 F.2d at 1226 (5th Cir. 1986). See also Sumy v. Schlossberg, 777 F.2d 921 (4th Cir. 1985).

The bankruptcy estate includes whatever property interests the debtor had at the commencement of the case, and that whatever restrictions were placed upon such property rights pre-petition continue to exist post-petition. Creasy v. Coleman Furniture Corp., 763 F. 2d 656 (4th Cir. 1985) Cross Electric Co., Inc. v. United States, 664 F. 2d 1218 (4th Cir. 1981).

The Trustee stands in the same position as the bankrupt, subject to all the liens, claims and equities that existed against the bankrupt. In re Mid-West Tar Products Corp., 150 F. Supp. 163 (U.S. Dist Ct., Dist. Md., 1956) (emphasis supplied); Angeles Real Estate Company v. Kerxton, 737 F.2d 416 (4th Cir. 1984); In re FCX, Inc., 853 F. 2d 1149 (4th Cir. 1988).

There is no question that the Debtor's interest in the Property was conveyed. If the Property is owned in tenancy by the entirety, the Debtor's "present interest" in the property was conveyed. The "present interest" of a Debtor in entireties property was set forth in In re Ford, 3 B.R. 559 (Bankr. D. Md. 1981) to include:

> a. The present right to survivorship in all of the property.
>
> b. The right to one-half the property if tenancy by the entireties is broken by divorce, or voluntary action of both parties.
>
> c. The right to one-half the income from the property.
>
> In re Ford, supra at 566, citing Whitelock v. Whitelock, 156 Md. 115, 143 A. 712 (1928); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916)

Under tenancy by the entirety, the trustee had, (and could sell), custody of the Debtor's undivided interest consisting of the same unities, intact and unaltered, as they

existed immediately prior to filing of the petition...In Re Ford 3 B.R. 550, 570 (Bankr. D.Md. 1980). The purchasers therefore would hold custody of the Debtor's rights. Any property that comes into the Debtor's hands flows through him to the Purchasers. But as long as both husband and wife survive and the tenancy is not otherwise broken, the co-owner retains the right to possession of all of the property.

The Court is empowered to authorized the Trustee to sell property held in tenancy by the entirety "only if" the Trustee complied with 11 U.S.C. Section 363(h), (i) and (j). This was not done. Therefore, Plaintiff's interest has not been sold or transferred to anyone by the Trustee. As a consequence, Plaintiff has no claim to the proceeds of the sale of the Debtor's interest, and no claim against the Trustee.

The Trustee has no bankruptcy estate interest to protect. He has sold with Court approval the Debtor's interest in the property. The sale is complete, and ratified (affirmed) by the Court. The Court lacked statutory authority to convey the co-owner's interest in the property because the Trustee had not complied with 11 U.S.C. §363 (h)(i) & (j).

Once the sale was ratified by the Court, the purchaser in conclusively presumed to have agreed to accept whatever title the Trustee could convey. Handlan v. Bennett, 51 F. 2d 21, 24 (4th Cir. 1931). There the Court said:

> [c]aveat emptor applies in all its force to judicial sales and that it will be conclusively presumed that the purchaser agrees to take the title such as it is and that if he permits the sale to be confirmed without objection, he cannot afterward refuse to pay the purchase price because of imperfection of title or for errors of irregularities in the proceedings under which he purchased. This rule prevails in

bankruptcy sales unless the order of sale otherwise provides."

The principle that a sale to a purchaser by a trustee in bankruptcy is on a caveat emptor basis was set forth in In re Brown, 67 B.R. 635 (E.D. Ark., W.D., 1986) as follows:

> Purchaser from trustee in bankruptcy is entitled to absolutely no warranties, other than warranties in trustee's deed.
>
> "A trustee can sell only such title as he has, and – unless he specifically purports to sell more – he is not liable for being unable to convey more than was his in the first instance. * * *"
>
> "In the absence of specific warranty clauses the bankruptcy sale is governed by the rule of 'caveat emptor.' It is for the purchaser to examine in time what is sold and under what conditions. He may not after discovery of a defect covered by the 'caveat emptor' principle refuse payment of the purchase price or claim abatement." 4B Collier on Bankruptcy, ¶ 70.98. p. 1201, n. 15 (14th ed. 1978). * *"
>
> "[T]he applicable law however, holds that actual knowledge of the applicability of bankruptcy rules and governance is immaterial. **"The purchaser at a trustee's sale is bound at his peril to know whether or not the bankruptcy court is proceeding within its jurisdiction in making a sale to him." 4B Collier on Bankruptcy, ¶ 70.98. p. 1201, n. 15 (14th ed. 1978). "It must be**

> **remembered that the doctrine of caveat emptor applies in all its force to judicial sales and that it will be conclusively presumed that the purchaser agrees to take the title such as it is * * *" Id. (emphasis added) * * *"**

See also In re Rigden 795 F.2d 727, 732 (9th Cir. 1986). In re Laughinghouse, 51 B.R.869, 876 (Bankr. E.D.N.C. 1985).

To the extent that the Court of Appeals departs from the foregoing principles to deprive a wife, who had a multi-million dollar interest separate from that of her husband, of her estate, the decision raises questions of discrimination, and introduces conflict among the Circuits.

WAIVER

The finding that Joanne "concealed" her claim of tenancy by the entireties ownership of the property and thereby lost her multi-million dollar claim to the assets is unsupportable. Her interest had never been a part of the subject matter before the Court. Only the Debtor's interest was a part of the bankruptcy estate. It is undisputed that she was at various times in the Courtroom, and at the Office of the Chapter 11 Trustee, available to be summoned as a party or witness, or to answer questions. If silence constituted "waiver", what interest was waived – her multi-million dollar property interest, or her tenancy by the entireties status to allow the husband's one-half interest in the property to be sold.

PRIVITY

It was error to hold that Plaintiff was in privity with Fred Allnutt in the case before Judge Smalkin, decided and entered July 21, 1993 (App. 86-93)

A copy of Judge Smalkin's Judgment and Order is at App. 86-88, and his Memorandum Opinion is at App. 89-93.

Plaintiff, Joanne, was not a party of record, and was not involved as party or witness in the case.

What constitutes privity for purposes of res judicata, and the requirements to establish privity were addressed in Ungast v. Fontaine, 189 Md. 227, and quoted in Douglas v. First Security Federal Savings Banks, Inc., 101 Md. App. (1994), as follows:

> [G]enerally the parties to a suit are those persons who are entered as parties of record. But for purposes of the application of the rule of res judiciata the term "parties" includes all persons who have a direct interest in the subject matter of the suit, and have the right to control proceedings, make defense, examine the witnesses and appeal if an appeal lies. So where persons although not formal parties of record, have a direct interest in the suit and in the advancement of that interest take open and substantial control of its prosecution, or if they are so far represented by another that their interests receive actual and efficient protection, any judgment recovered therein is conclusive upon them to the same extent as if they had been formal parties.

Measured against the foregoing criteria, Plaintiff was not in "privity" with any party to the earlier litigation.

(1) The Plaintiff was not a party of record to either the District Court litigation, nor to the Bankruptcy. The Trustee could only sue for the Debtor's interest in the property, not the Plaintiff's.

Plaintiff's interest was not so far represented by another that her interests receive actual and efficient protection. In the District Court action, the interests of the Fred Allnutt and the children in trying to uphold the sham trusts was adverse to Plaintiff's.

c. In the Bankruptcy case, the interests of all parties -- Trustee, purchaser and creditors -- were adverse to Plaintiff's.

RES JUDICATA

The factual predicate for re judicata (claim preclusion) to apply was set out in Douglas v. First Security Federal Savings Bank, Inc., 101 Md. App. 170, 181 (1994), quoting Major v. First Virginia Bank, 97 Md. App. 520, 533-34 631 A. 2d 127 (1993). The Court said:

> Under Maryland law the requirements for res judicata or claim preclusion are: 1) that the parties in the present litigation are the same or in privity with parties to the earlier dispute, 2) That the claim presented in the current action is identical with the one determined in the prior adjudication, and 3) That there was a valid final judgment on the merits. * * * All three elements must be present for the final judgment in the first claim to bar the second claim.

As to Joanne Allnutt, the instant case fails all three elements set forth above. The requirements for privity for

purposes of res judicata to ban the second suit were not met, as shown above. The claim presented here is not identical with the claims before Judge Smalkin in the District Court.

COLLATERAL ESTOPPEL

The requirements for collateral estoppel to apply are not present here as to Joanne Allnutt.

The factual predicate for collateral estoppel to apply was set out In O'Reilly v. County Board of Appeals for Montgomery County, Maryland, 900 F. 2d 789, 791 (4th Cir. 1990). The Court stated that under Maryland law, collateral estoppel, or issue preclusion, applies only if it established that:

> (1) the issue decided in the prior adjudication is identical to the issue in the present action,
>
> (2) there was a prior final judgment on the merits, and
>
> (3) the party against whom the decision is being used **was a party in the prior action.** MPC, Inc. v. Kenny, 279 Md. 29, 35, 367 A.2d 486, 490-491 (1977)

The Court further stated that absent a clear identity of issues, the Plaintiff should not be estopped.

The evidentiary facts needed to support the present complaint are those that show that the property used in the business was owned by the Plaintiff and the Debtor, husband and wife, as tenants by the entireties. None of the evidence in the "District Court litigation" has any bearing on the issues here.

Thus there was no – privity, and both res judicata and collateral estoppel are inapposite in this case. There was no identity of parties; the "privity" of Plaintiff solely by reason of being married to the Debtor does not give the Debtor the

independent right to surrender the wife's ownership interests in tenancy by the entirety property in the District Court litigation; there was no identity of cause of action, nor of the evidentiary facts needed for the current litigation compared to the earlier litigation.

CONCLUSION

The Petitioner prays that the award of sanctions be set aside; that the decision be reversed; and that the matter be remanded to the Circuit Court for Howard County, Maryland for further proceedings.

Dated: July 6, 1999

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Supreme Court, U.S.
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entered June 21, 1993 ..... App. 89

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2630
(CA-98-1212-WMN

In Re: FRED W. ALLNUTT, SR.,

Debtor,

JOANNE ARMSTRONG ALLNUTT,

Plaintiff - Appellant,

versus

ASSOCIATES LEASING, INCORPORATED;
MILLER & MILLER AUCTIONEERS, INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,

Defendants - Appellees,

OFFICE OF THE US TRUSTEE,

Party-in-Interest.

No. 98-2678
(CA-98-1212-WMN)

In Re: FRED W. ALLNUTT SR.,

Debtor,

JOANNE ARMSTRONG ALLNUTT,

Plaintiff - Appellee,

versus

ASSOCIATES LEASING, INCORPORATED,
Defendant - Appellant,

OFFICE OF THE US TRUSTEE,
Party-in-Interest,

and

MILLER & MILLER AUCTIONEERS, INCORPORATED; URBAN N. ZINK CONTRACTORS, INCORPORATED; MARK J. FRIEDMAN; CHARLES J. MILLER, INCORPORATED,
Defendants.

FILED: March 9, 1999
ENTERED: March 9, 1999

ORDER

Associates Leasing, Incorporated has filed a motion for sanctions, for an injunction and for an order entering final judgment against Joanne Allnutt and Tracy Mulligan. Associates Leasing has also filed a petition for extraordinary writ. Joanne Allnutt has filed responses to the motions.

The Court grants the motion for sanctions, in the amount of costs and attorneys' fees relating only to the appeal from the district court, grants the motion for an extraordinary writ, affirms the judgment of the district court and denies the motion for injunction.

Entered at the direction of Judge Luttig with the concurrence of Judge Williams and Judge Motz.

For the Court

/s/ William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. 92-5-7401-JFS
(Chapter 11)
Civil Action No. WMN-98-1212
(consolidated with
Civil Action No. WMN-98-1706)

In Re: Fred W. Allnutt, Sr.

* * * * * * * *

JOANNE A. ALLNUTT

v.

ASSOCIATE LEASING, INC.
et al.

ENTERED: SEPTEMBER 25, 1998
FILED: SEPTEMBER 25, 1998

MEMORANDUM

These consolidated appeals challenge various orders issued by Bankruptcy Judge James F. Schneider in Adversarial Action No. 96-5598-JFS. In Civil Action No. WMN-98-1212, Appellants JoAnne Allnut and her attorney, Tracey Mulligan, challenge an order issued on March 20, 1998 in which Judge Schneider:

> 1) granted the motion to intervene filed by the Chapter 11 trustee of the bankruptcy estate of Fred W. Allnut;

2) denied Appellants' motion to remand the adversarial proceeding to the Circuit Court for Howard County from whence it was removed;

3) granted the motions of Appellees to dismiss Appellant JoAnne Allnut's claims; and

4) granted Appellees' motion for sanction against Ms. Allnut and Mr. Mulligan and imposed sanction against them, jointly and severally, in the amount of $66,929.01.

In Civil Action No. 98-1706, Appellants appeal from orders issued April 24, 1998 granting Appellees final money judgments in the amount of the sanctions imposed in the March 20, 1998 order. Also in Civil Action No. WMN-98-1706, Appellants filed a motion asking this Court to issue an order declaring that the Bankruptcy Court lacks subject matter jurisdiction and to set aside all orders issued by the Bankruptcy Court in Adversarial Action 96-5598-JFS.

The legal conclusions of the Bankruptcy Court are reviewed by this Court de novo. Caswell v. Jeffrey Lang, 757 F.2d 609 (4th Cir. 1985). Having reviewed the pleadings, the transcript of the proceedings below, and the relevant case law, the Court determines that no hearing is necessary (bankruptcy Rule 8012) and that the decision of the Bankruptcy Court should be affirmed.

Judge Schneider issued a thorough and well-reasoned 65 pages opinion addressing all of the arguments that Appellants now raise. Those arguments were totally devoid of merit when raised before Judge Schneider, and remain equally without merit when reraised here. Appellants raise nothing new. Accordingly, the undersigned sees little point in adding more paper to a bankruptcy file that, as Judge Schneider has noted, already consumes over four feet of shelf space. Therefore, this Court will affirm the decision of the Bankruptcy Court for the reasons stated in Judge

Schneider's March 20, 1998 Memorandum Opinion. This Court will briefly address, however, two issues related to the imposition of sanctions.

The first issue related to the amount of sanctions awarded by Judge Schneider. The $66,929.01 sanction imposed is equal to the sum of the attorneys' fees claimed by the Appellees. – Appellants argue that these fees are unreasonable but that "[i]t did not appear feasible" to challenge the amount claimed as fees given the "climate that existed" in the Bankruptcy Court. Appellants' Brief at 46. I have reviewed the documentation submitted with the motions for sanctions and find the fees to be fair and reasonable. The amounts spent by Appellees to address Appellants' claim are particularly fair and reasonable given that Appellants sought as damages against Appellees over Sixty-One Million Dollars.

The second issue relates to Appellees' request that this Court impose further sanctions against Appellants for pursuing a plainly meritless appeal. This Court will deny that request. In the hearing before Judge Schneider, Mr. Mulligan specifically requested an assurance that an appeal of the Bankruptcy Court's decision would not be deemed improper conduct and thus, would not be the basis for increased sanctions. Judge Schneider assured Mr. Mulligan that it would not. 2/24/97 Trans. at 122. While I am not certain that I am bound by that assurance, I will honor it nonetheless.

A separated order consistent with this memorandum will issue.

/s/ William M. Nickerson
United States District Court

Dated: September 25, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In Re: Fred W. Allnutt, Sr.

* * * * * * *

JOANNE A. ALLNUTT

v.

ASSOCIATE LEASING, INC.
et al.

Case No. 92-5-7401-JFS
(Chapter 11)
Civil Action No. WMN-98-1212
(consolidated with
Civil Action No. WMN-98-1706)

ENTERED: SEPTEMBER 25, 1998
FILED: SEPTEMBER 25, 1998

ORDER

For the reasons stated in the foregoing memorandum, IT IS this 25th day of September, 1998, by the United States District Court for the District of Maryland, ORDERED:

1. That the decisions and orders of the Bankruptcy Court issued March 20, 1998 and April 24, 1998 are AFFIRMED;

2. That Appellant's motion for declaratory judgment, Paper No. 7 in Civil Action No. 98-1709, is DENIED;

3. That Appellees' request for additional sanctions related to this appeal is hereby DENIED;

4. That Civil Action Nos. WMN-98-1212 and WMN-98-1709 are hereby CLOSED;

5. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/ William M. Nickerson
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re: FRED W. ALLNUTT, SR.,
Debtor.

JOANNE A. ALLNUTT,
Plaintiff.

v.

ASSOCIATES LEASING, INC.,
MILLER & MILLER AUCTIONEERS; INC.,
CHARLES J. MILLER; INC.,
URBAN N. ZINK CONTRACTORS, INC., and
MARK J. FRIEDMAN, Chapter 11 Trustee of the Estate of Fred W. Allnutt, Sr.
Defendants.

Case No. 92-5-7401
Chapter 11
Adversary No. 96-5598-JS
(Case No. 96-CA-32296 in the Circuit Court for Howard County, Maryland.)

ENTERED: March 20, 1998
FILED: March 20, 1998

MEMORANDUM OPINION IMPOSING SANCTIONS JOINTLY AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL IN THE AMOUNT OF $66,929.01

During the pendency of the debtor's Chapter 11 bankruptcy case, his non-filing spouse filed the instant complaint in a state court against nondebtor defendants for wrongful detainer and conversion of property which she

alleged was sold by her husband's Chapter 11 trustee and in which the plaintiff alleged she held an undivided interest as tenant by the entireties. The defendants removed the suit to this Court, where the Chapter 11 bankruptcy case of the plaintiff's husband, Fred W. Allnutt, Sr. ("Allnutt," or "debtor"), is pending. The plaintiff moved to remand. The Chapter 11 trustee, who was not sued with the original defendants, filed a motion to intervene. The defendants moved to dismiss the complaints and to impose sanctions against the plaintiff and her counsel. The plaintiff filed oppositions to the motions to dismiss and the motion for sanctions. For the reasons stated, the Chapter 11 trustee's motion to intervene will be granted, the plaintiff's motions to remand will be denied, the motions to dismiss will be granted, and the motion for the imposition of sanctions against both the plaintiff and her attorney will be granted. In addition, a permanent injunction will issue against the debtor, his insiders and agents, including his, her, or their attorneys, from contesting the validity of sales of property of the bankruptcy estate by the Chapter 11 trustee, subject to additional sanctions.

FINDINGS OF FACT

On September 27, 1996, the plaintiff, Joanne Armstrong Allnutt, a resident of Maryland and the wife of the Chapter 11 debtor in this case, filed the instant suit in the Circuit Court for Howard County, Maryland. The suit stated that the plaintiff and Fred W. Allnutt, Sr., have been husband and wife since 1958.

The defendants sued in the state court were Miller & Miller Auctioneers, Inc. (Miller & Miller"), a Texas corporation; Associates Leasing, Inc. ("Associates"), a Virginia corporation; Charles J. Miller, Inc. ("Charles J. Miller"), a Maryland corporation; and Urban N. Zink Contractors, Inc. ("Zink"), also a Maryland corporation (collectively, "the original defendants"). They removed the

suit to this Court.

The cause of action which forms the gravamen of the complaint arose out of actions taken by the debtor's Chapter 11 trustee in the bankruptcy court in connection with a court-approved sale of assets of the bankruptcy estate. The eight-count complaint sought the return of the property or damages in the amount of $40,555,167.23, from Miller & Miller; the return of property or damages in the amount of $19,720,464.74, from both Miller & Miller and Associates; the return of property or damages in the amount of $523,182.00, from Charles J. Miller; and the return of property or damages from Zink in the amount of $281,167.00. Exhibit A to the complaint was the bill of sale dated September 29, 1993, signed by the trustee and Miller & Miller; Exhibit B to the complaint identified the property sought to be recovered by the plaintiff as the same inventory of assets sold by the trustee to Miller & Miller. The complaint was signed by "Tracy E. Mulligan, attorney for Plaintiff."

The notorious career of Fred W. Allnutt, Sr.,("Allnutt" or "debtor") as a tax protester has inspired a well-documented odyssey of seemingly endless litigation in the state and federal courts over the past 14 years.[1]

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[1] **Allnutt v. State**, 59 Md.App. 694, 478 A.2d 321 (1984), **cert. denied**, 301 Md. 639, 484 A.2d 274 (1984), **appeal dismissed**, 471 U.S. 1050, 105 S.Ct. 2108, 85 L.Ed.2d 474 (1985)(criminal conviction of debtor for willful failure to file a 1981 state income tax return, sales tax returns and to pay sales tax); **Allnutt v. Comptroller of Treasury,** 61 Md.App. 517, 487 A.2d 670 (1985) **cert. denied**, 303 Md. 295, 493 A.2d 349 (1985) (no right to jury trial in the Maryland Tax Court); **Howard County V. Fred W. Allnutt, Inc.,** 74 Md.App. 422, 538 A.2d 321 (1988)(priorities of liens for unpaid sales tax); **Allnutt v. Comptroller of Treasury**, 77 Md.App. 424, 550 A.2d 728 (1988), **cert. denied**, 315 Md. 307, 554 A.2d 393 (1989)(denial of injunction to debtor to enjoin assessment and collection of Maryland income tax and imposing $1,275 sanction against Allnutt and counsel); **Allnutt v. Commissioner,** No. 9225-89, 1991 WL 2061 (U.S. Tax Ct. Jan. 14, 1991), **aff'd by unreported opinion,** 956 F.2d 1162 (4th Cir. 1992), **cert. denied,** 506 U.S. 816, 113 S.Ct. 57, 121 L.Ed.2d 25 (1992)(upholding debtor's federal

On October 2, 1992, the Internal Revenue Service ("IRS") filed suit in the U.S. District Court for the District of Maryland and obtained an order permitting it to seize the assets of the debtor's company, then known as JFC Excavating ("JFC").[2] Thereafter, the IRS seized and impounded the heavy equipment of JFC for non-payment of taxes.

On October 7, 1992, JFC, Christopher Allnutt, the son of Fred W. Allnutt, Sr., together with Sovereign Equipment Association, Constitution Leasing Association,

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income tax liability for tax years 1981 through 1986, and imposing sanction of $25,000 against the debtor); **Allnutt v. U.S., Etal,** No. 92-9778 (D.Md. June 21, 1993)(holding that Allnutt was the sole owner of entities created by him to thwart collection of taxes); **Allnutt v. Aronin**, 8 F.3d 816, 1993 WL 431064 (4th Cir. 1993)(affirming removal from state court and dismissal of Allnutt's complaint for damages against the U.S. and others, including Marc Aronin, the IRS agent involved in the seizure of JFC assets); **In re Allnutt**, 16 F.3d 408, 1994 WL 5128 (4th Cir. 1994)(denying Allnutt's petition for mandamus to order the U.S. district court to remand his complaint against the U.S. to the state court); **Allnutt v. Friedman (In re Allnutt),** Nos. 94-2957, 94-3612, 1995 WL 45797 (D.Md. January 20, 1995)(moot issues of debtor's tax liability); **Allnutt v. Friedman (In re Allnutt),** No. 95-11, 1995 WL 222067 (D.Md. April 10, 1995)(affirming refusal by bankruptcy court to vacate district court orders determining debtor to be owner of assets of entity owned or controlled by debtor, and imposing $28,121 sanction against debtor and additional $1,404 sanction against debtor and counsel jointly for filing frivolous appeal); **Allnutt v. IRS,** No. 93-5121 (Bankr.D.Md.)(dismissed by order [Teel, B.J.] entered October 28, 1997); **Allnutt v. IRS,** No. 94-CV-3491 (D.Md. 1994)(complaint brought under the Freedom of Information Act, dismissed upon motion for summary judgment, November 9, 1995).

[2] The debtor's company was formerly known as "Fred W. Allnutt, Inc." *Howard County v. Fred W. Allnutt, Inc.*, 74 Md.App. 422, 538 A.2d 321 (1988)(priorities of liens for unpaid sales tax); *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 421 A.2d 1360 (1980).

[3] Incomplete schedules were also filed by Allnutt's counsel that did not contain a list of property claimed as exempt.

and Ellicott Building Association, filed suit against the IRS in the U.S. District Court for the District of Maryland to recover the assets of JFC, a company owned and controlled by Allnutt. JFC was identified in the complaint as "an unincorporated Maryland partnership," while each of the other three associations was identified as "a Maryland trust." The three associations were created by Fred W. Allnutt, Sr., to hold title to the assets of JFC for the purpose of evading the payment of various federal, state and local taxes. The suits were later consolidated, and on January 20, 1993, Allnutt joined the suit.

On October 9, 1992, one day after the U.S. District Court [Northrop, J.] denied the plaintiffs' request for an interlocutory injunction against the IRS, Allnutt filed a voluntary Chapter 11 bankruptcy petition[3] in the U.S. Bankruptcy Court for the District of Maryland. On the same day, Allnutt filed Adversary Proceeding No. 92-5475 in this Court, seeking an injunction to require the IRS to return the JFC property to him. In light of Allnutt's public record as a tax protestor and the U.S. District Court's refusal to order the IRS to return the JFC property, this Court declined to order the IRS to unconditionally return the assets of JFC to Allnutt to operate as a debtor in possession. However, on October 27, 1992, upon the suggestion of this Court, and by agreement of Allnutt and the IRS, the United States Trustee appointed Mark J. Friedman, Esquire, as operating Chapter 11 trustee. This facilitated the turnover of excavating equipment by the IRS to Mr. Friedman and the resumption of the business of JFC under the aegis of the U.S. Bankruptcy Court.

Except for the aforementioned suit against the IRS, Allnutt steadfastly disavowed owning the assets of JFC in an effort to avoid the tax consequences of that ownership. At no time during the administration of the bankruptcy case did Allnutt claim that the assets of JFC were exempt from

administration by the trustee as property held by the entireties or otherwise.[4] Instead, he disputed the inclusion of JFC in the bankruptcy estate by renouncing his ownership of its assets. At no time during the administration of the bankruptcy case did Mrs. Allnutt assert a claim to the assets of JFC. If there ever was property of JFC held by the entireties by Allnutt and the plaintiff, they concealed this fact from the trustee and this Court.

On February 9, 1993, the Chapter 11 trustee filed an objection [P. 94] to the exemptions which the debtor claimed merely "to state a position as to the Proposed Exemptions," namely that they were not properly claimed in accordance with the state exemption statute. In his objection, the trustee set forth an enumeration of the assets that were subject to his administration:

> In addition to the Debtor as an individual, the Chapter 11 Trustee is also administering a business known as JFC Excavating which is engaged in business as an excavation contractor. In addition and in connection with the JFC Excavating business, the Chapter 11 Trustee is administering the following:
>
> (a) the real property and building located at 10370 Baltimore national

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[4] On January 22, 1993, the Chapter 11 trustee filed *unsigned* schedules and statements of affairs prepared by Allnutt [P. 64]. The trustee noted that Allnutt had claimed exemptions in certain property not relevant here under the federal exemptions contained in Section 522 of the Bankruptcy Code, which are not available to debtors in Maryland. The only property claimed exempt by Allnutt and the plaintiff were household items characterized as "community property." The trustee informally agreed not to sell any property which Allnutt and the plaintiff claimed to own jointly. Affidavit of Mark J. Friedman dated February 7, 1997, ¶3 (Exhibit 8 to Trustee's motion to dismiss and for sanctions) [P. 16].

> Pike, Ellicott City, Maryland which serves as the business premises for JFC Excavating and for which the recorded owner is an entity identified as Ellicott Building Association;
> (b) the vehicles which are and have been used in the JFC Excavating business, which are registered in the name of an entity known as Constitution Leasing Association;
> (c) various off-road excavation and related equipment which has been and is used in the JFC Excavating business and which is represented by the Debtor to be owned by an entity known as Sovereign Equipment Association.

Trustee's objection to exemptions [P. 94].

The Chapter 11 trustee intervened in the district court litigation and filed a counterclaim and third-party complaint for turnover of property, avoidance of fraudulent conveyances and injunctive relief. The trustee alleged that JFC and the associations were the alter egos of the debtor who exercised such dominion and control over them that they were his instrumentalities, and that he was their beneficial owner.

On June 21, 1993, Allnutt's assertions to the contrary, U.S. District Judge Frederic N. Smalkin upheld the trustee's contentions, and held that JFC and its related entities were indeed the sole property of Fred W. Allnutt, Sr., therefore includable in the debtor's bankruptcy estate, and entered summary judgment in favor of the IRS on Allnutt's claim of wrongful levy. Essential to Judge Smalkin's decision in the U.S. District Court litigation was the following finding of fact:

> [T]he devices employed by Mr. Allnutt, Sr., to hide his assets from the tax collector are so transparently shams and fraud that no reasonable fact-finder could give credence, by any known standard of evidence, to the wrongful levy plaintiffs' ownership claims to the property in question. Indeed, no fact-finder functioning within the realm of intelligence and common sense, let alone guided by reason, could so find.

Allnutt v. U.S., Etal, No. 92-9778, Memorandum Opinion at p.4.[5]

On September 29, 1993, this Court entered an order [P. 236] authorizing the Chapter 11 trustee to sell substantially all equipment, vehicles and miscellaneous parts used in the JFC Excavating business free and clear of liens and encumbrances to Miller & Miller Auctioneers, Inc., for a

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[5] After Allnutt and the plaintiffs in the wrongful levy action filed an appeal to the U.S. Court of Appeals for the Fourth Circuit, they entered into a settlement agreement with the trustee which this Court approved by order [P. 335] entered on June 22, 1994, supplemented as to the IRS by order [P. 395] entered on September 8, 1994, which dismissed the appeal. The agreement between the Chapter 11 trustee, Allnutt and his children, and one Marsden Furlow stated in pertinent part, as follows:

> In accordance with, and based upon, the District Court Judgment, the Settling Defendants agree, for the purposes of the Bankruptcy Case and any other action, proceeding or matter involving the Trustee, Mark J. Friedman, individually and/or the bankruptcy estate, that all the property administered by the Trustee, presently or in the past, is property of the Bankruptcy Estate (specifically including, but not limited to, JFC Excavating, all revenues derived therefrom and the proceeds of the JFC Excavating Sale) and the Settling Defendants acknowledge no further rights therein.

Settlement Agreement, ¶8 [P. 326].

purchase price of $6.6 million; authorizing the trustee to sell real property known as 10370 Baltimore National Pike[6], and furniture, fixtures and related office equipment to Nicholas B. Mangione, Sr.; and authorizing the trustee to assume and assign certain executory contracts to Nicholas B. Mangione, Sr., for a purchase price of $800,000. Allnutt, who was represented by counsel, endorsed the sale as approved. The order approving the sale pursuant to Section 363 of the Bankruptcy Code was entered at the conclusion of a two-day hearing and contained the following provisions:

> The notice of the Original Motion served upon creditors and other parties in interest adequately explains the basis for the chapter 11 Trustee's decisions to sell the Inventory, Real property and FFE [furniture, fixtures and equipment] and the assumption and assignment of the executory contracts and no additional notice for the Amended Motion is required.
>
> The notice of the hearing on the Original Motion was timely served upon all creditors and other parties in interest upon whom service was required and the notice satisfies the provisions of Bankruptcy Rules 2002, 6004 and 9006.
>
> This Court finds that M&M [Miller & Miller] and Mangione have acted, and that their offer was submitted, in good faith. M&M and Mangione are entitled to the

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[6] By stipulation and order [P. 241] entered on the record on October 29, 1993, this Court approved an agreement between the trustee and Smith W. Allnutt and Margaret G. Allnutt, the debtor's parents, to the effect that the mortgage lien held by the debtor's parents on the real estate known as 10370 Baltimore National Pike in the amount of $61,618.90, would attach to the proceeds of sale and that they would be paid in full no later than October 31, 1993.

> protection of Section 363(m) of the Bankruptcy Code in connection with the consummation of the Agreement to be entered into by them with the Chapter 11 Trustee, attached hereto, which is hereby approved. The consideration of offers by the Chapter 11 Trustee was conducted upon fair and reasonable terms calculated to achieve the highest and best value for the assets used in connection with the JFC Excavation Business.

Paragraphs C, D and G, Order of September 29, 1993 [P. 236].

After the sale was approved, Miller & Miller resold equipment, vehicles and miscellaneous parts used in the JFC Excavating business to Associates, Charles J. Miller, Inc.,and Zink.

Associates' parent company, Associates Commercial Corporation, was a prepetition secured creditor of Allnutt's bankruptcy estate by reason of its security interests in heavy construction equipment of JFC, doing business as Sovereign Equipment Company. Claim No. 17 filed February 11, 1993, in the secured amount of $244,528.05. On March 4, 1993, Associates Commercial Corporation filed a motion for relief from stay in the Allnutt bankruptcy case [P. 120], but consented to defer the motion pending a sale. Associates leased the items it purchased to Mr. Mangione, in lieu of granting him a chattel mortgage. Charles J. Miller, a small company owned by three brothers, bought one excavator. Zink bought one power grader.

By order [P. 573] entered on March 30, 1995, this

Court confirmed the Chapter 11 trustee's plan of liquidation[7] [P. 489], that extinguished the rights of the debtor and those claiming through him to property of the estate.[8]

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[7] The Plan contained the following relevant provisions:

> 6.4. Cancellation of Debtor's Interest in the Estate. On the Effective Date of the plan, all of the Debtor's Interest in assets and property of the Estate shall be canceled without further action by the Trustee or the Court except as otherwise provided in the Plan and except to the extent the Court allows the Debtor to exempt, or otherwise exempts, any property from the estate consistent with Section 522 of the Bankruptcy Code.
>
> 8.1. General Discharge of and Release from Claims and Interests.
>
> (a) Except as expressly otherwise provided in the Plan and except as provided by Section 523 of the Bankruptcy Code, or by Order of the Court, effective on the Effective Date, confirmation of the Plan shall fully discharge and release the Debtor, pursuant to section 1141(d)(1)(A) of the Bankruptcy Code, from any and all Claims, including, without limitation, debts, demands and labilities, that arose before the Confirmation Date and all debts of a kind specified in Section 502(g), 502(h) or 502(i) of the Bankruptcy Code whether or not:
>
> (i) a proof of claim based on such Claim has been or is deemed to have been filed under Section 501 of the Bankruptcy Code;
> (ii) such Claim is an Allowed Claim or disallowed under Section 502 of the Bankruptcy Code;
> (iii) such Claim arises in connection with a cause of action pending against the Debtor on the Confirmation Date; or

(iv) any Claimant has accepted the Plan.

(b) The distributions and rights afforded in the Plan to Claimants, unless otherwise provided in the Plan, the Bankruptcy Code or by Order of the Court, shall be in complete and full satisfaction , discharge and release of all Claims against the Debtor and the Estate or any of their respective assets or properties of any nature whatsoever and, except as expressly provided in the Plan, the Bankruptcy Code or by Order of the Court, all creditors shall be precluded forever from asserting against the Debtor, the estate or their assets and properties any other or further liabilities, liens, Claims, encumbrances, obligations, or equity interests, including, but not limited to all principal and accrued and unpaid interest on the debts of the Debtor based on any act or omission, transaction or other activity or security instrument or other agreement of any kind or nature occurring, arising or existing prior to the Confirmation Date, that was or could have been the subject of any Claim, whether or not allowed.

(c) On and after the Confirmation Date, as to every discharged Claim, every holder of a discharged Claim shall be precluded from asserting against the Debtor and the Estate or their respective assets or properties any further Claim based on any document, instrument or act, omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date. In accordance with the foregoing, except as provided in this Plan, the Confirmation order, the Bankruptcy Code or by Order of the Court, the Confirmation order shall be a judicial determination of discharge of all such Claims and other debts and liabilities against the Debtor and the Estate. Pursuant to Sections 524 and 1141 of the Bankruptcy Code, such discharge shall void any judgment obtained against the Debtor or

the Estate, at any time, to the extent that such judgment relates to a discharged Claim.

8.2. Bankruptcy Injunction. Except as otherwise provided in this Plan or the Confirmation Order, effective on the Confirmation Date, all persons that have held, currently hold or may hold a Claim or other debt or liability that is discharged or a Claim against the Debtor or the Estate that is terminated, or canceled pursuant to the terms of this Plan, are permanently enjoined from taking any of the following actions against the debtor, the Estate and the respective property and assets: (a) commencing or continuing, in any manner or in any place, any action or other proceeding; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (c) creating, perfecting or enforcing any lien or encumbrance; (d) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to the Estate or the debtor; and (e) commencing or continuing any action in any manner or any place that does not comply with or is inconsistent with the provisions of the Plan.

8.6. Rights of Action. Pursuant to Section 1123(b)(3) of the Bankruptcy Code, the Estate will retain, and the Trustee will have the exclusive right to enforce, any and all present or future rights or causes of action against any Person and rights of the Estate that arose before or after the Filing Date, including but not limited to, avoidance powers granted to the Trustee under the Bankruptcy Code and all causes of action and remedies granted pursuant to Sections 502, 510, 541, 544, 545, 547 through 551 and 553 of the Bankruptcy code, other than those specifically compromised as part of the Plan or previously waived by the Trustee.

Trustee's plan of liquidation [P. 489], ¶¶ 6.4, 8.1, 8.2, 8.6.

8. The order of confirmation contained the following provisions:

3. On the Effective Date, all legal right, title and interest in and to the assets and property of the bankruptcy estate shall remain subject to

Allnutt's obstructionist tactics have prolonged the duration of this Chapter 11 and so multiplied the proceedings that the files in his bankruptcy case, exclusive of appeals and adversary proceedings, extend nearly four feet in length, comprising some 24 file folders, not counting a claims file. Allnutt has filed untold numbers of groundless objections in the bankruptcy court and numerous appeals to the U.S. district and circuit courts. In addition, he has actively pursued various sellers and purchasers of bankruptcy estate assets by filing nuisance suits against them in state courts,

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> administration by the Trustee in order to implement the Plan and shall not revest in the Debtor.
>
> 4. Pursuant to Article 6.4 of the Plan, on the Effective Date of the Plan, all of the Debtor's interest in assets and property of the bankruptcy estate shall be canceled without further action by the Trustee or by the Court.
>
> 5. As of the Effective Date of the Plan, the Debtor shall be fully discharged and released, except as otherwise provided by the Plan, pursuant to Section 1141(d)(1)(A) of the Bankruptcy Code, from any and all claims, including without limitation, debts, demands and liabilities that arose before the Confirmation Date, except as provided by Section 523 of the Bankruptcy Code or otherwise by order of this Court. . .
>
> 8. Notwithstanding anything to the contrary, this Court retains jurisdiction in this bankruptcy case in accordance with the provisions of Article 11 of the Plan.

Order of confirmation [P. 573], entered March 30, 1995, ¶¶ 3-5, 8.

which the defendants later removed to this Court.[9] The instant adversary proceeding came about when, for the second time in two years, Joanne A. Allnutt, the Chapter 11 debtor's non-filing spouse, sued purchasers of bankruptcy estate property in a non-bankruptcy forum[10].

Although the Chapter 11 case involving the plaintiff's husband was and is still pending, the plaintiff did not obtain leave to file the state court complaints, nor did she pursue any of her alleged rights before this Court. Instead, on September 27, 1996, two days short of the third anniversary of the bankruptcy court order that approved the sale, Joanne A. Allnutt filed an eight-count complaint in the Circuit Court for Howard County against Miller & Miller, Associates, Charles J. Miller, and Zink, for detinue and conversion of the property "sold out of bankruptcy by Mark J. Friedman, Trustee." The plaintiff alleged that "all property claimed herein has been acquired by the plaintiff, Joanne Armstrong

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9 *Allnutt v. Lewis,* No. 94-5195-JS (Bankr.D.Md., removed April 29, 1994) (Charles Lewis was an employee of Miller & Miller Auctioneers); *Allnutt v. Miller & Miller Auctioneers,* No. 94-5328-JS (Bankr.D.Md., removed July 28, 1994); *Allnutt v. Wilcoxson,* No. 94-5413-JS (Bankr.D.Md., removed September 28, 1994), 105 F.3d 646, 1997 WL 9762 (4th Cir. 1997)(Stephen L. Wilcoxon was the vice president of Atlantic Auctions, which sold the race car assets).

10 On November 16, 1994, Mrs. Allnutt filed suit in the Circuit Court for Howard County against the purchasers of the so-called "race car assets" obtained by sale conducted by the Chapter 11 trustee under the auspices of the U.S. Bankruptcy Court. She was represented by Tracy E. Mulligan, Esquire, the same attorney who is representing her in the instant suit. The claim in that suit was the same as the instant suit, namely, that assets of the estate sold by the Chapter 11 trustee were owned by Mr. and Mrs. Allnutt as tenants by the entireties. After the case was removed to the U.S. Bankruptcy Court, this Court denied the plaintiff's motion to remand, deferred the defendants' motions to dismiss, and ordered the plaintiff to join the Chapter 11 trustee as a defendant. *Allnutt v. Metro Recovery, Ltd., et. al.,* No. 94-5501-JS (Bankr.D.Md., order entered Sep. 26, 1995). Instead, the plaintiff filed a motion for interlocutory appeal to the U.S. District Court, and while the motion was pending, dismissed the suit on March 5, 1996.

Allnutt, and Fred W. Allnutt, Sr., during their marriage, through their joint efforts, and is owned by the plaintiff, Joanne Armstrong Allnutt as tenant by the entirety." The plaintiff further alleged that the assets sold were first acquired from a loan on a residence held by the debtor and plaintiff as tenants by the entireties. The complaint sought the return of the property or the value of the property and damages for its wrongful retention. The total value the plaintiff attributed to the property was $15,716,650. Total damages sought from all defendants was $45,363,330.97.

Exhibits to the pleadings included joint tax returns filed by Mr. and Mrs. Allnutt during the period covering the late 1960s and early 1970s that indicated JFC was an excavating business operated as a sole proprietorship and owned solely by Mr. Allnutt. Other exhibits included various promissory notes bearing the sole name of Fred W. Allnutt, Sr., as the stated owner. While the plaintiff's name and signature did appear on several documents, they were co-signed by her individually or as secretary. In the debtor's attempts to deny ownership of the business, his statements taken at various depositions indicated that he was operating as a sole proprietorship and that he sold the business to his sons in 1983. The affidavit of one son, Christopher S. Allnutt, stated that he and his brother became the owners of their father's excavating business in 1983. All of this evidence was elicited in the bankruptcy case at a time when the debtor was attempting to repudiate his ownership of the assets. The plaintiff now claims, in spite of all the statements of her family to the contrary, that she held an interest as a tenant by the entireties in the property sold by the Chapter 11 trustee to the defendants.

On December 30, 1996, Associates Leasing, Inc. removed the plaintiff's suit against it to the U.S. Bankruptcy Court (Adversary Proceeding No. 96-5598). This was followed on January 2, 1997, by the removal of the plaintiff's suit by Miller & Miller Auctioneers, Inc. (Adversary Proceeding No. 97-5017), and on January 15, 1997, by the

removal of the suit by Charles J. Miller, Inc. (Adversary Proceeding No. 97-5047). The Chapter 11 trustee was not sued in the state court, but filed a motion to intervene after the suit was removed to the bankruptcy court.

The plaintiff filed objections to removal and motions to remand each adversary proceeding to the Circuit Court for Howard County. The defendants moved to dismiss the complaints and the plaintiff filed oppositions to those motions. Associates filed a motion to impose sanctions against both the plaintiff and her attorney, in which the other defendants joined.[11]

At the hearing before this Court on February 24, 1997, Tracy E. Mulligan stated that he practices in the state and federal courts of Maryland. His federal practice is primarily centered in the Greenbelt division of the U.S. Bankruptcy Court for the District of Maryland. Mr. Mulligan angrily charged that the Chapter 11 trustee did not properly administer the bankruptcy case. The fact that the Chapter 11 trustee's conduct is at the center of this controversy is evident from Mr. Mulligan's comments on the record:

> The statutes and the cases are what have guided me in this case. The statutes tell me that this case was not handled properly and that an attempt has been made to sell something that should not have been sold and could not have been sold out of the bankruptcy court under the procedures that were followed.

Mr. Mulligan defended the proposition that the debtor would recover much of the property that the trustee had sold with bankruptcy court approval if this suit were successful and argued that such a recovery would be proper. When asked by this Court if he did not agree that a lawsuit

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[11] On February 13, 1998, this Court consolidated the three separate adversary proceedings into the instant pending adversary proceeding.

against innocent purchasers was outrageous, Mr. Mulligan replied: "The way that they [the debtor and the plaintiff] have been financially destroyed is also a bit outrageous." Questioned further by this Court as to whether the debtor was the moving force behind this lawsuit, Mr. Mulligan significantly replied:

> I did not even know *the Allnutts. They* came to me after the sale.

[Emphasis supplied.] After stating that he was ignorant as to what had happened in the Allnutt bankruptcy case, Mr. Mulligan contradicted himself and said:

> I presented this in good faith. I made a careful study of the facts and as I saw the facts and applied them to the law, it seemed to me that [the plaintiff's] interests had not been properly handled by the bankruptcy trustee but that the sale was complete and the proper forum to determine whether she had title to the property or not is the state court. That's consistent with many of the cases that I have carefully researched.

Mr. Mulligan was completely unrepentant for bringing the instant lawsuit and argued that this Court could not impose sanctions under Federal Rule of Civil Procedure 11 because the lawsuit was filed in state court, rather than federal court.

This Court reminded Mr. Mulligan that he might have been ignorant of the facts of this case at one time, but that by the date of the hearing he could no longer claim ignorance of those facts. Since the time of the filing of the earlier lawsuit in 1994, he has been in full possession of those facts, this Court having advised him that a valid sale had occurred under the aegis of the bankruptcy court as to

the race car assets. Mr. Mulligan voluntarily dismissed that suit after suing innocent purchasers in the state court and after filing an interlocutory appeal of this Court's requirement that he join the trustee as a necessary party.

Mark J. Friedman, the Chapter 11 trustee, stated that Mrs. Allnutt also knew and understood that a valid sale of the JFC assets had taken place in the bankruptcy court, because she was present at the hearing on the motion to sell before this Court and was also present at the Chapter 11 trustee's office when the sale agreement was executed. As further confirmation that the plaintiff knew exactly what was happening, the trustee indicated that on the latter occasion, Mrs. Allnutt "asked me whether any further actions would be initiated by me to recover any other assets of the bankruptcy estate." Affidavit of Mark J. Friedman dated February 7, 1997, ¶¶ 4,5, and 6 (Exhibit 8 to Trustee's motion to dismiss and for sanctions) [P. 16].

CONCLUSIONS OF LAW

There is no doubt, based upon the record in this case, that the debtor is the sponsor of the instant lawsuit, as its true beneficiary and real party in interest. As the wife of the debtor, the plaintiff is an insider who shares with him an identity of interest. 11 U.S.C. §101(31). As an insider, the plaintiff's close relationship with the debtor subjects her conduct to greater scrutiny than those dealing with the debtor at arm's length.

The plaintiff's claim of ownership in JFC as a tenant by the entireties is but the latest in a long line of legal maneuvers employed by the debtor and others under his control and direction to thwart the IRS and frustrate the jurisdiction of this Court. As Allnutt's spouse, the plaintiff was on notice that he had filed bankruptcy, and that the Chapter 11 trustee was liquidating estate property in which she later claimed an interest.

The state court complaint was an implicit attack upon both the jurisdiction of the bankruptcy court to validly sell the debtor's property and the Chapter 11 trustee, who conducted the sale and who was not joined as a party.

THE BANKRUPTCY COURT HAS SUBJECT MATTER JURISDICTION OVER THE INSTANT ADVERSARY PROCEEDING

This Court has subject matter jurisdiction over the instant suit because its outcome could have a substantial impact upon the administration of the Allnutt bankruptcy case by nullifying a court-approved sale of estate assets and by revesting those assets in the debtor in contravention of the order of confirmation. Sales of property are core proceedings arising under Title 11, as defined in 28 U.S.C. §157(b)[12],

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[12] Section 157(b) of Title 28 of the U.S. Code provides as follows:

> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection
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> (a) of this section, and may enter appropriate orders and judgments, subject to review under Section 158 of this title.
>
> (2) Core proceedings include, but are not limited to—
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> (A) matters concerning the administration of the estate;
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful

over which this Court has jurisdiction pursuant to 28 U.S.C.

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death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims. *Id*

§1334(a)[13].

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[13] Section 1334 of Title 28 of the U.S. Code provides:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive

Core proceedings are those matters necessarily incidental to a bankruptcy case that affect the restructuring of debtor-creditor relations and the liquidation of estate assets. *Edgcomb Metals Co. v. Eastmet Corp.*, 89 B.R. 546, 548 (D.Md 1988). This action is a core proceeding because it calls into question the power of the bankruptcy court to conduct a core proceeding, namely a sale of estate property. Allegations of impropriety in the conduct of bankruptcy sales are core proceedings pursuant to 28 U.S.C. §157(b)(2)(A),(N) and (O).

Although the instant suit was filed as a claim under state law for conversion and detinue in a state court by an insider of a debtor *while the bankruptcy case is still open*, in reality the suit is a challenge to a Chapter 11 trustee's bankruptcy sale approved by the bankruptcy court. A proceeding is not deemed to be "non-core" merely because its outcome may be influenced by state law. 28 U.S.C. §157(b)(3); *Arnold Print Works v. Apkin (In re Arnold Print Works)*, 815 F.2d 165, 169 (1st Cir. 1987). Assuming that the plaintiff's complaint were justified and she were found to be entitled to relief, the effect would be to void the sale conducted by the Chapter 11 trustee under the aegis of the bankruptcy court.

The power of this Court to consider such allegations is so essential to its ability to administer assets of bankruptcy estates that such power is beyond question. It is irrelevant to the exercise of this power that the property which is the subject of the suit has been sold, because the object of the suit is the return of that property to the possession and control of the debtor or the recovery of damages for its deprivation during the pendency of the bankruptcy case. Part of the determination of whether the bankruptcy court has subject matter jurisdiction is whether the court has the power

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jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.
Id.

to grant the requested relief within its core functions. Strictly for purposes of the jurisdictional inquiry, the Court assumes that the plaintiff would be entitled to obtain the requested relief, exclusive of any procedural or substantive defenses to the suit. Because the instant suit concerns the approval of a sale of estate assets, and assuming the plaintiff's allegations to be well-taken and the requested relief to be justified, the bankruptcy court has subject matter jurisdiction over the instant controversy because it has the power to void the sale. In other words, assuming that the instant suit alleged sufficient grounds to entitle the plaintiff to have the sale voided, it is this Court, the bankruptcy court which approved the sale in the first place, that has the theoretical power to set the sale aside or afford the plaintiff other ancillary relief. If the debtor is entitled to be put back in possession of property, it is this Court, which dispossessed him of that property, that has the theoretical power to restore the property to his possession, while the bankruptcy case remains open.

Because the plaintiff would have no cause of action except for the bankruptcy sale, the present suit is one "arising in" the jurisdiction of the bankruptcy court. *Simmons v. Johnson, Curney & Fields, P.C. (In re Simmons),* 205 B.R. 834, 840 (Bankr.W.D.Tex. 1997); *Bergstrom v. Dalkon Shield Claimants Trust (In re A.H. Robins, Inc.),* 86 F.3d 364 (4th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 483, 136 L.Ed.2d 377 (1996). "Matters 'arising in' Title 11 'are those not based on any rights expressly created in Title 11, but those which nevertheless would have no existence outside the bankruptcy.'" *Celotex Corp. v. AIU Ins. Co. (In the Matter of the Celotex Corp.),* 152 B.R. 667, 672, fn. 7 (Bankr.M.D.Fla. 1993), *quoting Wood v. Wood (In re Wood),* 825 F.2d 90, 97 (5th Cir. 1987). Although none of the parties to the suit is a debtor, the plaintiff is an insider who, as the debtor's non-filing spouse, is claiming ownership in the debtor's property as his co-tenant in privity with the debtor. *Because the plaintiff and Allnutt are still husband and wife,*

her recovery of damages and/or property from the defendants would have the consequence of restoring the debtor to possession of money and assets of the bankruptcy estate as a tenant by entireties with the plaintiff. Assuming a favorable verdict for the plaintiff, the outcome of the suit would undo the work of the trustee in liquidating property of the bankruptcy estate and would return that property to the debtor's possession, as if a bankruptcy case had never been filed, as if no bankruptcy trustee had ever been appointed to take control of the assets, as if U.S. District Judge Smalkin had not decided that the assets of JFC were subject to the claims of the IRS. *Cf. In the Matter of Betty A. Linton*, ___ F.3d ___, 1998 WL 63841 (7th Cir. 1998).

The plaintiff's counsel argued that this Court no longer has subject matter jurisdiction over this controversy because the *res* in which the plaintiff is asserting an interest is no longer property of the bankruptcy estate. This Court disagrees. The cases that stand for the proposition that a bankruptcy court has no subject matter jurisdiction to decide questions of title to property after a bankruptcy sale do not apply to the instant case which concerns lawsuits brought by debtors and their agents against purchasers of estate property during the pendency of the case. *See for example In the Matter of Edwards*, 962 F.2d 641 (7th Cir. 1992)(suit by second mortgagee against *bona fide* purchaser to determine priority of lien); *Wisconsin Department of Industry, Labor and Human Relations v. Marine Bank Monroe (Matter of Kubly)*, 818 F.2d 643 (7th Cir. 1987)(suit to determine priority of liens on proceeds of assets sold out of bankruptcy estate); *Elscint, Inc. v. First Wisconsin Financial Corp.(In the Matter of Xonics, Inc.)*, 813 F.2d 127 (7th Cir. 1987)(unrelated dispute between two creditors to property that formerly belonged to debtor); *Cook v. Griffin*, 102 B.R. 875 (N.D.Ga. 1989)(title dispute between nondebtors over real property alleged to be owned by debtors); *Miller v. Kemira, Inc. (In the Matter of Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th Cir. 1990)(action for contempt brought by

debtor's former landlord against purchaser of debtor's property); and *Blaustein v. Aiello,* 229 Md. 131, 182 A.2d 353 (1962), *cert. denied*, 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 494 (1963)(objections to foreclosure sale filed by purchaser of property from bankruptcy trustee). These cases are distinguishable from the case at bar, where the subject matter of this suit is the right of a debtor and his insider, who have been dispossessed of property by bankruptcy court orders, to contest those orders by means of vexatious litigation brought in a nonbankruptcy forum during the pendency of the bankruptcy case in the absence of bankruptcy court approval. The instant case is also distinguishable because here federal bankruptcy law will provide the rule of decision.

THE PLAINTIFF'S MOTIONS TO REMAND WILL BE DENIED

The state court in which the complaint was filed did not have subject matter jurisdiction to set aside the bankruptcy court-approved sale, based upon facts set forth on the face of the complaint. The plaintiff's rights to such property could only be derived from a properly-claimed exemption filed in the bankruptcy case, followed by an objection to the trustee's sale pursuant to 11 U.S.C. §363. As cogently stated by Judge Keir of this Court:

> In Maryland, "conversion has been generally defined as the wrongful exercise of dominion by one person over the personal property of another." *Kalb v. Vega,* 56 Md.App. 653, 665, 468 A.2d 676, 683 (1983). In order to successfully plead conversion, it must be shown that the appropriation of property was unauthorized or without the consent of the owner. *Matter of Burdick,* 65 B.R. 105, 108 (Bankr.N.D.Ind. 1986). An act

> which would otherwise constitute a conversion may be precluded from having that effect by a plaintiff's consent to the act. *Restatement (Second) of Torts* § 252 (1965). Nonconsent to the possession and disposition of the property by the Defendant are therefore indispensable. If an owner expressly or impliedly assents to, or ratifies the taking, use, or disposition of the property, the owner cannot recover for conversion. *Rose Brothers, Inc. V. City of Alva,* 536 P.2d 1083, 1085 (Okla. 1960).

Nationsbank of D.C., N.A. v. Blier (In re Creative Goldsmiths of Washington, D.C.), 178 B.R. 87, 93 (Bankr.D.Md. 1995).

The plaintiff's motions to remand will be denied because the instant complaint filed in the Circuit Court for Howard County was properly removed to the U.S. Bankruptcy Court for the District of Maryland. 28 U.S.C. §1452(a)[14]. In the case of *Allnutt v. Wilcoxson,* 105 F.3d 646, 1997 WL 3762 (4th Cir. 1997), in which Allnutt was sanctioned for harassing a purchaser of the so-called race car

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[14] Section 1452(a) provides:

> § 1452. Removal of claims related to bankruptcy cases
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> > (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
>
> 28 U.S.C. §1452(a).

assets by haling him into a state court for a deposition supposedly to preserve testimony in advance of the filing of a suit challenging the sale, the Fourth Circuit upheld the removal jurisdiction of the bankruptcy court in these words:

> Allnutt's subpoena for a deposition to perpetuate evidence was to obtain evidence for use in filing an action to challenge the bankruptcy court's sale of the race car assets. Challenges to the propriety of sales of assets of the bankruptcy estate are core bankruptcy proceedings pursuant to 28 U.S.C. § 157(b)(2)(A)(1994). *See In re Elegant Equine, Inc.*, 155 B.R. 189, 191 (Bankr.D.Ill. 1993); *In re American Solar King*, 142 B.R. 772 (Bankr.W.D.Tex. 1992). Because the bankruptcy court would have jurisdiction over the anticipated underlying action, the subpoena action to perpetuate testimony was properly removed to the bankruptcy court. *See* 11 U.S.C. Rule 9027.
> *Id.*

Although artfully pleaded to avoid the appearance of coming within the subject matter jurisdiction of the bankruptcy court, the instant complaint on its face attacked the bankruptcy court-approved sale of the debtor's property in which the plaintiff untimely asserted an interest, and therefore was properly removed. Remand was properly denied because this Court is the only tribunal having original, exclusive jurisdiction over the subject matter of the complaint.

On February 24, 1998, while this opinion was nearing completion, the Supreme Court handed down a decision in the case of *Rivet v. Regions Bank of Louisiana*, ___ U.S. ___, 1998 WL 71832, which reversed 108 F.3d 576 (5th Cir. 1997). The decision held that where removal on

grounds of a federal question was premised upon a prior federal judgment entered by a bankruptcy court that precluded the state law claim, the defensive plea of claim preclusion did not provide a proper basis for removing a state lawsuit to a U.S. district court. Instead, the Court stated, "The defense of claim preclusion . . . is properly made in the state proceeding, subject to this Court's ultimate review." *Rivet*, 1998 WL 71832, at 2. The opinion supports the decision in the instant case to uphold removal and deny motion to remand.

At the time the suit was removed in *Rivet*, the bankruptcy case in which the preclusive orders had been issued was closed. The suit was removed to a U.S. district court pursuant to 28 U.S.C. §1441(a), the general federal removal statute, rather than the bankruptcy removal statute, 28 U.S.C. §1452(a). *Cf. Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995). Therefore, *Rivet* did not concern the jurisdiction of the state court being preempted by the subject matter jurisdiction of a bankruptcy court.

The decision in Rivet turned upon claim *preclusion*, rather than claim *preemption,* as in the instant case, where this Court has held that the subject matter jurisdiction conferred upon the bankruptcy court by federal law completely preempted the state court from entertaining the instant case. While the application of the doctrine of claim preclusion may determine the outcome of the instant case, the Court finds that federal jurisdiction, specifically conferred upon this Court by the Bankruptcy Code and the Judicial Code, completely preempted the jurisdiction of the state court so that removal of the plaintiff's claim to the bankruptcy court was proper. The language of the Supreme Court in *Rivet* as its relates to the instant case confirms this conclusion:

> We have long held that "[t]he presence or absence of federal-question jurisdiction is

governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987); *see also Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908). A defense is not part of a plaintiff's properly pleaded statement of his or her claim. *See Metropolitan Life Ins. Co. V. Taylor,* 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987); *Gully v. First Nat. Bank in Meridian,* 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936)("To bring a case within the [federal-question removal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."). Thus, "a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 14, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983).

Allied as an "independent corollary" to the well-pleaded complaint rule is the further principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Id.*, at 22, 103 S.Ct., at 2853. If a court concludes that a plaintiff has "artfully pleaded" claims in this fashion, it

> may uphold removal even though no federal question appears on the face of the plaintiff's complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. *See Metropolitan Life Ins. Co.*, 481 U.S., at 65-66, 107 S.Ct., at 1547-48 (upholding removal based on the preemptive effect of § 502(a)(1)(B) of the Employment Retirement Income Security Act); *Avco Corp. V. Machinists*, 390 U.S. 557, 560, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968)(upholding removal based on the preemptive effect of § 301 of the Labor Management Relations Act). Although federal preemption is ordinarily a defense, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law. *Caterpillar*, 482 U.S., at 393, 107 S.Ct., at 2430.

Rivet v. Regions Bank of Louisiana, ___ U.S. ___, 1998 WL 71832, at 4.

THE TRUSTEE'S MOTION TO INTERVENE WILL BE GRANTED

The trustee will be permitted to intervene because the trustee is a necessary party as the representative of the debtor's estate. *Heyman v. M.L. Marketing Co.*, 116 F.3d 91, 94-95 (4th Cir. 1997). The bankruptcy estate has an interest in these proceedings because the outcome could nullify the sale of substantially all of the assets and revest them in the debtor's possession, thereby nullifying the order confirming the trustee's plan of liquidation. The trustee's joinder on

behalf of the estate is necessary because this suit challenges the propriety of the trustee's conduct in the administration of the bankruptcy case that the trustee should defend on the estate's behalf.

No suit may be brought in a state court against a trustee or counsel to a debtor in possession for alleged misconduct in liquidating assets of a bankruptcy estate without leave of the bankruptcy court. *Hallock v. Key Federal Savings Bank (In re Silver Oak Homes, Ltd.)*, 167 B.R. 389, 394-95 (Bankr.D.Md. 1994). "It is well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993), citing the doctrine of *Barton v. Barbour,* 104 U.S. 126, 26 L.Ed. 672 (1881). By failing to join Mark J. Friedman, the Chapter 11 trustee, a necessary party to the state court action,[15] the plaintiff attempted to circumvent the procedure of obtaining leave of court to file the state court suit.[16]

Most recently, a decision in the case of *In the Matter of Betty A. Linton*, ___ F.3d ___, 1998 WL 63841 (7th Cir. 1998), decided February 18, 1998, held that the doctrine of *Barton v. Barbour* prevents a suit against a trustee without leave of court *after the bankruptcy case has been closed.*

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[15] Even though Mr. Friedman was an operating trustee, the doctrine of *Barton v. Barbour* has been held to be applicable to a cause of action that relates to the trustee's conduct in liquidating assets of a bankruptcy estate. *Missouri Dept. Of Nat. Resources v. Valley Steel Products Co., Inc. (In re Valley Steel Products Co., Inc.)*, 157 B.R. 442, 448 (Bankr.E.D. Mo. 1993); *Mangun v. Bartlett (In re Balboa Improvements, Ltd.)*, 99 B.R. 966, 970 (9th Cir. BAP 1989).

[16] The plaintiff selected her targets with care, failing to join Mr. Mangione, who is now her husband's employer, and Mr. Friedman, the trustee, whose joinder would have raised a red flag indicating that the complaint should have been filed in the bankruptcy court.

Speaking on behalf of the Seventh Circuit, Chief Judge Posner wrote:

> At stake in the present case, however, is a concern . . . with the integrity of the bankruptcy jurisdiction. If debtors, creditors, defendants in adversary proceedings, and other parties to a bankruptcy proceeding could sue the trustee in state court for damages arising out of the conduct of the proceeding, that court would have the practical power to turn bankruptcy losers into winners, and vice versa. A creditor who had gotten nothing in the bankruptcy proceeding might sue the trustee for negligence in failing to maximize the assets available to creditors, or to the particular creditor. A debtor who had failed to obtain a discharge might through a suit against the trustee obtain the funds necessary to pay the debt that had not been discharged.
>
> Of course principles of *res judicata* and the good faith of state courts would head off the worst consequences of the kind of divided jurisdiction over bankruptcy matters that we have just described. But a simpler and more secure protection is to require the person wanting to bring a suit in state court against a trustee in bankruptcy to obtain leave to do so from the bankruptcy court. We can draw an analogy between federal officers and bankruptcy trustees, and hence between the federal officers' removal statute, 28 U.S.C. § 1442, see *Arizona v. Manypenny,* 451 U.S. 232, 241-42, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981), and the judge-made doctrine requiring leave of the bankruptcy court to sue the

> trustee. The latter has actually a more secure constitutional pedigree, because it responds to the concern that motivated the framers of the Constitution in authorizing Congress to enact uniform, nationwide bankruptcy laws. Art. I, § 8, cl. 4 -- concern that states might favor debtors, or creditors, unduly. Joseph Story, *Commentaries on the Constitution of the United States* § 540, pp. 386-87 (1833).
> 1998 WL 63841, at 2.

THE INSTANT COMPLAINT WAS PROCEDURALLY IMPROPER

During the administration of a bankruptcy case, it is not proper for an insider to keep silent regarding her co-ownership of property of the debtor that was being administered by his trustee. The concealment of the plaintiff's interest from the trustee and the bankruptcy court and her suit against the purchasers of assets in a state court after the consummation of the sale without seeking approval of the bankruptcy court was manifestly improper. Instead, the plaintiff should have sought an order from the U.S. bankruptcy court before the sale, pursuant to Section 363(e) of the Bankruptcy Code, which provides, *inter alia*:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Id. Section 363 was the mechanism pursuant to which this Court approved the sale of the JFC assets to the defendants.

Despite protections to a co-owner of property subject to sale in a bankruptcy estate found in Section 363,[17] the plaintiff did not raise the issue of her alleged entireties ownership in the bankruptcy court or attack the sale in this Court, either before or after it took place.[18] "[A]fter the time for appeal had lapsed, the order could not be attacked in a new lawsuit brought by a party to the sale proceeding or by a successor to that party or by anyone else so far identified with such a party as to be classified as being in privity with him; such a suit would be barred by *res judicata*. The only other remedy would be a motion to vacate the judgment under Rule 60(b)." *Gekas v. Pipin (In the Matter of Met-L-Wood Corp.),* 861 F.2d 1012, 1016 (7th Cir. 1988), *cert. denied,* 490 U.S. 1006, 109 S.Ct. 1642, 104 L.Ed.2d 157 (1989).

The burden was upon the debtor and those claiming derivative rights to property of the estate through him to assert claims to that property against the right of the trustee to administer those assets during the pendency of the bankruptcy case. Section 363(h) requires that a trustee who wishes to sell a co-owner's interest in property of the estate

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[17] Section 363(h) provides that when four conditions are met, "the trustee may sell both the estate's interest . . . and the interest of any co-owner in property in which the debtor had . . . an undivided interest as . . . tenant by the entirety." Section 363(i) provides that prior to the consummation of a sale of property, a debtor's spouse, who is a tenant by the entireties, "may purchase such property at the price at which such sale is to be consummated[;]" Section 363(j) provides that after the sale of property held in a tenancy by the entireties, "the trustee shall distribute to the debtor's spouse . . . and to the estate, the proceeds of such sale . . . according to the interests of such spouse . . ." 11 U.S.C. §363(h).

[18] Section 363(m) provides that "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal." 11 U.S.C. §363(m).

file an adversary proceeding against the co-owner prior to the sale of the co-owner's interest. 11 U.S.C. §363(h). However, in the absence of knowledge of the existence by the trustee of a co-owner's claim, the trustee need not initiate a declaratory judgment action in the bankruptcy court to determine the nature of the debtor's ownership interest in property of the estate. Any rights the plaintiff may have had to claim an interest in property of the bankruptcy estate as the debtor's spouse were cut off when the property was sold by the Chapter 11 trustee after the debtor failed to exempt the property as that held by tenants by the entireties, and/or when the plaintiff, with full knowledge of the sale, failed to object to it. *Veltman v. Whetzal,* 93 F.3d 517, 522 (8th Cir. 1996). The Seventh Circuit went even farther, stating in *Gekas v. Pipin (In the Matter of Met-L-Wood Corp.),* 861 F.2d 1012, 1017 (7th Cir. 1988):

> A proceeding under section 363 is an *in rem* proceeding. It transfers property rights, and property rights are rights good against the world, not just against parties to a judgment or persons with notice of the proceeding.
> *Id.*

The sale in this case was properly conducted by the Chapter 11 trustee. The sale was properly approved by order of this Court and conveyed good title to the property that was conveyed. The order approving the sale determined the buyers to be *bona fide* purchasers.

A bankruptcy court has the powers of a court of equity. *U.S. v. Energy Resources Co.,* 495 U.S. 545, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). Section 105(a) of the Bankruptcy Code provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* During the pendency of a Chapter 11 proceeding, and in aid of its jurisdiction, the bankruptcy court having been clothed

with the exclusive jurisdiction to deal with property of a Chapter 11 estate, has the inherent power to enjoin debtors, insiders and their agents, including attorneys, from attacking sales of estate property in State courts, to prevent a debtor from regaining title to estate property by circumventing and negating the bankruptcy process, to enforce its valid orders, and to prevent the debtor and the debtor's agents from injuring third parties by misconduct which is determined to be both fraudulent and vexatious. *Cf. Celotex Corp. v. Edwards,* 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995); *WBQ Partnership v. Commonwealth of Virginia Department Of Medical Assistance Services (In re WBQ Partnership),* 189 B.R. 97 (Bankr.E.D.Va. 1995); *In re G.S.F. Corp.,* 938 F.2d 1467 (1st Cir. 1991); *Menard-Sanford v. Mabey (In re A.H. Robins),* 880 F.2d 694 (4th Cir.),*cert. denied*, 493 U.S. 959, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989); *MacArthur Co. V. Johns-Manville Corp. (In re Johns-Manville Corp.),* 837 F.2d 89 (2d Cir.), *cert. denied,* 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed. 2d 145 (1988).

A permanent injunction will issue against the debtor, his insiders and agents, including his, her, or their attorneys, from contesting the validity of sales of property of the bankruptcy estate by the Chapter 11 trustee, subject to further severe sanctions.[19]

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[19] The Chapter 11 trustee's confirmed plan [P. 489] contained a reservation of jurisdiction in this Court for these and other purposes, as follows:

> 11.1 The Court will retain jurisdiction after the Confirmation Date of the Plan for the following:
>
> (a) Except as to the Allowed Secured Tax Claims, the allowance and classification of any Claim, the estimation of any Claim, the re-examination of any Claim which has been allowed for purposes of voting, and the determination of any objections that may be or may have been filed to Claims (the failure by the Trustee to object to, or to examine for the purposes of voting, any Claim as of the

Confirmation Date shall not be deemed a waiver of the trustee's right to object to, or to re-examine, the Claim in whole or in part after the Confirmation Date);

(b) The determination of all questions and disputes regarding title to assets of the Estate, approval of distributions and payments under the Plan and determination of all causes of action, controversies, disputes, conflicts or Claims involving the Estate or the Trustee including, but not limited to, all litigation or contested matters pending before the Court on the Confirmation Date, any litigation or contested matters filed subsequent to the Confirmation Date, and any right of the Estate to recover assets pursuant to the provisions of the Bankruptcy Code;

(c) The correction of any defect, the curing of any omission, or the reconciliation of any inconsistency in the Plan or the Confirmation order as may be necessary to carry out the purposes and intent of the Plan;

(d) The modification of the Plan after the Confirmation Date pursuant to applicable Bankruptcy Rules and the Bankruptcy Code;

(e) The enforcement, implementation and interpretation of the terms of the Plan and the resolution of any objections which may be filed or issues which may arise with respect to any actions taken or proposed to be taken pursuant to the provisions of the Plan;

(f) The entry of any order, including injunctions, necessary to enforce the title, rights and powers of the Estate and the trustee under the Plan and to impose such limitations, restrictions, terms and conditions of such title, rights and powers as the Court may deem necessary;

THIS COURT WILL TREAT THE DEFENDANTS' MOTIONS TO DISMISS AS MOTIONS FOR SUMMARY JUDGMENT AND WILL GRANT THEM

Pursuant to Federal Rule of Civil Procedure 12(b), made applicable to the instant adversary proceeding by Bankruptcy Rule 7012(b), the defendants' motions to dismiss shall be treated as motions for summary judgment. The parties to this action have presented documents outside the pleadings that have not been excluded by this Court. When matters outside the pleadings are "presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." Fed.R.Civ.P. 12(b); *Finley Lines Jt. Protect. Bd. v. Norfolk So. Corp.*, 109 F.3d 993, 995 (4th Cir. 1997).

Motions for summary judgment are governed by Bankruptcy Rule 7056, which makes Fed.R.Civ.P. 56 applicable to adversary proceedings. The standard for granting summary judgment is as follows:

> Summary judgments are appropriate in those cases where there is no genuine dispute as to a material fact and it appears that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, L. Ed. 2d 142 (1970). . . . However, where the record taken as a whole

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(g) The allowance of Professional Claims;

(h) Any claim against or related to the trustee or the Trustee's Professionals; and

(i) The entry of an order concluding and terminating this bankruptcy case.
Id.

> could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986).

Miller v. F.D.I.C., 906 F.2d 972, 973-74 (4th Cir. 1990).

The defendants are entitled to summary judgment without regard to the inconsistent positions on the record that the plaintiff and Allnutt have taken regarding title to the property. He has always disavowed owning the business; she now claims that the business was acquired during her marriage to the debtor, and that she jointly owned it with him as tenants by the entireties. The plaintiff has failed to produce any persuasive evidence from which such an inference could be drawn. In order to find that the plaintiff was the owner of an interest in JFC as a tenant by the entireties, it is axiomatic that Allnutt, the plaintiff's spouse, must also hold an ownership interest therein as a tenant by the entireties.

The plaintiff has never contested the decision of the U.S. District Court which held that the debtor was the sole owner of JFC, nor decisions of this Court disposing of JFC as property of Allnutt's bankruptcy estate. Collateral estoppel is properly applicable to a bankruptcy proceeding to prevent relitigation of issues actually and necessarily resolved in a prior nonbankruptcy proceeding. *Grogan v. Garner,* 498 U.S. 279, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991).

The plaintiff claims to have been the owner of bankruptcy estate property as "a tenant by the entireties." However, one spouse cannot be the joint owner of property by the entireties without the other spouse (in this case, the debtor) being the co-owner. In Maryland, the transfer of property to a husband and wife gives rise to a presumption that the property is held as tenants by the entireties unless a contrary intention is indicated. *Columbian Carbon Co. v.*

Kight, 207 Md. 203, 114 A.2d 28 (1955); *Kolker v. Gorn*, 193 Md. 391, 67 A.2d 258 (1949); *Marburg v. Cole*, 49 Md. 402 (1878).

Maryland law retains the traditional form of the tenancy by the entireties estate. "By common law, a conveyance to husband and wife does not make them joint tenants, nor are they tenants in common; they are in the contemplation of the law but one person, and hence they take, not by moieties, but by the entirety." *Beall v. Beall*, 291 Md. 224, 234, 434 A.2d 1015, 1021 (1981). The Court of Appeals of Maryland has described an estate held as tenants by the entireties estate as follows:

> [T]he tenancy by which husband and wife at common law hold land conveyed or devised to them by a single instrument which does not require them to hold it by another character of tenancy. The title of both husband and wife arises out of the instrument, whether deed, devise or gift, by virtue of which they become seized of the estate. A tenancy by the entirety cannot be created unless the four essential common law unities, namely, interest, title, time and possession, co-exist.

Bruce v. Dyer, 309 Md. 421, 427, 524 A.2d 777, 780 (1987) (*quoting* 2 H. Tiffany, *The Law of Real Property* § 430 (B. Jones, 3d ed. 1939 & 1987 Supp.)). "Neither [tenant] can alienate [the tenancy by the entireties property] without the consent of the other, and the survivor takes the whole." *Beall*, 434 A.2d at 1021, 291 Md. at 234 (*citing Marburg v. Cole*, 49 Md. 203 (1878)).

Mr. Mulligan's argument that this Court has no subject matter jurisdiction in this case proceeds from the false assumption that the plaintiff's claim to an ownership interest in the real property has already been established

under state law, which is not true. The record title to all of the property of JFC was in the names of the three entities created by the debtor to thwart the tax collector, namely Sovereign Equipment Association, Constitution Leasing Association, and Ellicott Building Association. These were the entities that Judge Smalkin decided were mere shams to camouflage Allnutt's sole ownership. No evidence was produced to support the claim that the business assets were conveyed to the plaintiff and the debtor as a marital unit. The plaintiff did not present any evidence or documents tending to establish any of the four unities. Therefore, because the four essential common law unities, namely, interest, title, time and possession were not demonstrated to co-exist, the plaintiff's claim that she and Allnutt owned the assets of JFC as tenants by the entireties must fail.

While questions of the ownership of property involved in a bankruptcy estate are determined by state law, whether property in which the debtor has an interest is property of the bankruptcy estate is a federal question. *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S. Ct. 1386, 1389, 118 L. Ed. 2d 39, 46 (1992); *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136, 141-42 (1979); *Board of Trade of Chicago v. Johnson,* 264 U.S. 1, 44 S.Ct. 232, 68 L.Ed. 533 (1924).

The filing of the bankruptcy petition in this case created a bankruptcy estate that included "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a). However, a debtor may exempt certain property from estate administration to obtain a fresh start. *Cheeseman v. Nachman,(In re Cheeseman),* 656 F.2d 60, 63 (4th Cir. 1981)(*citing* H.R. Rep. No. 595, 95th Cong., 1st Sess. 126 (1977), reprinted in U.S. Code Cong. & Ad. News 5963, 6087 (1978). *See also* 11 U.S.C. §522 (setting forth federal exemption law). Maryland has "opted out" of the federal exemption scheme. *See* 11 U.S.C. §522(b)(1); Md. Cts. & Jud. Proc. Code Ann. §11-504(g); *In re Ginn,* 186 B.R. 898

(Bankr.D.Md. 1995). The failure of both the debtor and the plaintiff to claim exemptions of so-called "entireties property" from administration by the Chapter 11 trustee waived their right to any such exemptions. *See* 11 U.S.C. §522(l); 4 *Collier on Bankruptcy* ¶522.07 (15th ed. 1997). The trustee was therefore within his rights to sell the property of JFC after notice pursuant to order of the bankruptcy court. §363(g),(h) and (i). The failure of a co-owner to object to a trustee's notice of sale has been held to authorize a sale free and clear of all liens, encumbrances and *interests*, such as the interest claimed here by the plaintiff. *Veltman v. Whetzal,* 93 F.3d 517 (8th Cir. 1996). Once the sale became final, by the failure to file a timely appeal or to obtain a stay pending appeal, the order approving the sale is no longer reviewable, pursuant to 11 U.S.C. §363(m). *Veltman,* 93 F.3d at 521, *citing In re CGI Indus., Inc.*, 27 F.3d 296 (7th Cir. 1994).

Citing *In re Ford,* 3 B.R. 559 (Bankr.D.Md. 1980), *aff'd. sub. nom. Greenblatt v. Ford,* 638 F.2d 14 (4th Cir. 1981), the plaintiff argued that because only the debtor's interest in entireties property became property of the estate, the plaintiff's interest in entireties property could not be sold by the trustee. The problem with that argument is that the debtor did not claim that he owned the property, either solely in his own right, or jointly with the plaintiff. All of the property that was later administered by the trustee came into the estate when the case was filed, as confirmed after the fact by the decision of the U.S. District Court [Smalkin, J.]

This Court need not rely upon the voluminous documents attached to the pleadings that support the finding that JFC was a sole proprietorship owned solely by the debtor.[20] Mr. and Mrs. Allnutt filed joint income tax returns

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[20] The joint tax returns of the plaintiff and the debtor supplementing the pleadings reported Allnutt as self-employed. The tax returns also reported Allnutt's earnings from the sole proprietorship. Despite a variety of trade names, the business was a sole proprietorship[21]

that identified JFC as a sole proprietorship owned solely by Mr. Allnutt. Therefore, the plaintiff is estopped from now characterizing the business as jointly-held. *See Robb-Fulton v. Robb (In re Robb),* 23 F.3d 895 (4th Cir. 1994)(taxpayer who deducted payments as alimony on his income tax returns was estopped from later claiming them as dischargeable support payments after he filed his bankruptcy petition).

The U.S. District Court [Smalkin, J.] conclusively determined that Allnutt was the sole owner of JFC. Collateral estoppel prevents the plaintiff, who is necessarily in privity with Allnutt, from later challenging that determination. *Harnett v. Billman,* 800 F.2d 1308 (4th Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987); *Reddick v. State,* 213 Md. 18, 30, 130 A.2d 762, 768, *cert. denied*, 355 U.S. 832, 78 S.Ct. 50, 2 L.Ed.2d 44 (1957); *Lichtenberg v. Sachs,* 200 Md. 145, 159, 88 A.2d 450, 456 (1952); *Ugast v. LaFontaine*, 189 Md. 227, 232-33, 55 A.2d 705, 708 (1947).

This Court's determination that the plaintiff may not now assert a claim to the assets of JFC is not only consistent with Judge Smalkin's decision, but is required by the preclusive effect of the order approving the sale pursuant to Section 363 of the Bankruptcy Code, *Matter of Edwards,* 962 F.2d 641 (7th Cir. 1992); and by reason of *res judicata,* collateral estoppel, equitable estoppel and waiver effected by the Chapter 11 trustee's confirmed plan of liquidation. *First Union Commercial Corp. v. Nelson (In re Varat Enterprises, Inc.),* 81 F.3d 1310, 1315 (4th Cir. 1996), citing *Stoll v. Gottlieb,* 305 U.S. 165, 170-71, 59 S.Ct. 134, 136-37, 83 L.Ed. 104 (1938).

The instant cause of action is so transparently sham and fraudulent that no reasonable finder of fact could

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21. The pleadings indicate that the sole proprietorship was incorporated at some point. See footnote 2. The business assets were subsequently taken out of the corporate shell, although the business continued to operate as it always had. "" - ' - "" '

determine there to be a genuine dispute as to a material fact. The plaintiff's suit is premised upon a claim that she and the debtor kept secret between themselves during the pendency of the bankruptcy case. To give legal effect to the clandestine claim of a debtor and those in privity with him against property of a bankruptcy estate that a trustee has already administered for the benefit of creditors is to damage the credibility of the judicial process in general and the bankruptcy process in particular. The highly prejudicial impact on the liquidation of the bankruptcy estate caused by the plaintiff's claim, raised as it was at such a late date, renders highly suspect the timing of the instant complaint.[22] The plaintiff's suit was frivolous and the defendants are entitled to judgment as a matter of law.

For all these reasons, the instant complaint must be dismissed, but not before the Court has considered the imposition of sanctions upon those who perpetrated this nefarious scheme.

THE IMPOSITION OF SANCTIONS UPON THE PLAINTIFF AND HER ATTORNEY

The plaintiff and her attorney have continued the debtor's efforts to obstruct the orderly administration of the bankruptcy estate by repeated and unwarranted lawsuits filed in the state court against *bona fide* purchasers of bankruptcy estate property. Principles of *res judicata* and collateral estoppel prevent the debtor and those acting on his behalf from attacking orders of this Court outside the usual appellate procedures during the pendency of the bankruptcy case. However, the plaintiff disregarded those strictures by

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[22] The claim of the IRS arose from the operation of the excavating business. Were the plaintiff indeed an owner of the assets by the entireties, the IRS would be a joint creditor and the proceeds of the sale could be used to satisfy the joint obligation. The plaintiff did not address this point or attempt to distinguish the instant case from *Sumy v. Schlossberg*, 777 F.2d 921 (4th Cir. 1985).

filing this frivolous and fraudulent claim in a non-bankruptcy forum that did not enjoy a knowledge of the history of the bankruptcy case. Mrs. Allnutt and Mr. Mulligan knew that they could not prevail in the bankruptcy court on her tenancy-by-the-entireties theory in light of the past admonitions of this Court. Instead, they filed this groundless suit in the state court and prayed a trial by jury.

The plaintiff's complaint exhibits a blatant disregard for the jurisdiction and authority of the federal courts, including the U.S. bankruptcy court, in which her husband, the debtor, voluntarily sought relief from debt. Instead of pursuing remedies provided by the Bankruptcy Code to protect her alleged interests in the JFC assets, the plaintiff filed a suit in state court without leave of this Court. The bankruptcy court is clothed with the authority to stop such antics in the exercise of its jurisdiction to liquidate property of the estate and to bring the administration of the bankruptcy case to a proper conclusion.

This is the second frivolous lawsuit brought by the debtor's spouse, *an insider,* in which innocent parties have been haled into court to respond to groundless claims. In advancing the discredited tenancy-by-the-entireties theory for the second time and attempting to side-step the effects of a sale approved by this Court on an inapplicable theory of law, the plaintiff and her attorney have attacked the jurisdiction and authority of this Court. Such an attack is an affront to the dignity of the judicial system, in bad faith, vexatious and wanton.

The instant complaint was filed in the state court in bad faith and without substantial justification, for the improper purposes of unreasonable delaying the administration of the Chapter 11 case, to frustrate the jurisdiction of the bankruptcy court by preventing the orderly liquidation of the debtor's estate, overturn decisions of the U.S. bankruptcy court and the U.S. district court, and harass and damage innocent parties whose only offense was to purchase estate assets from the trustee.

After the suit was removed to the bankruptcy court, the plaintiff and her attorney continued to insist that they were justified in bringing this action. However, this Court finds that Mrs. Allnutt and Mr. Mulligan could not have held a reasonable basis for believing that the instant complaint was justified, or that it would generate serious issues of fact, particularly in light of their previous attempt to use the tenancy-by-the-entireties theory. Under these circumstances, the bad faith and lack of substantial justification evident in this second suit merit the imposition of sanctions against both the plaintiff and her attorney. Mr. Mulligan argued that this Court may not impose sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011.[23] This Court disagrees.

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[23] Federal Rule of Bankruptcy Procedure 9011(a) provides:

> (a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction,

While it is correct that Rule 11 sanctions may not be imposed for merely signing a complaint that is filed in a State court and is subsequently removed to a federal court, *Kirby v. Allegheny Beverage Corporation*, 811 F.2d 253 (4th Cir. 1987), the maintenance of a frivolous and vexatious complaint after it was removed is a different story. The pleadings and other documents filed in this adversary proceeding on behalf of the plaintiff by her counsel after it was removed to this Court violated Federal Rule of Bankruptcy Procedure 9011. Mr. Mulligan filed various pleadings on the plaintiff's behalf after this adversary proceeding was removed to this Court, including motions to remand, objections to removal, oppositions to the motion to dismiss, and memoranda of law without substantial legal justification.

The plaintiff's counsel, Tracy E. Mulligan, departed from the objective standard of reasonableness, expressed in *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987), that necessarily governs the proper conduct of an attorney. An inquiry into an attorney's conduct "focuses only on whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified." *Cabell*, 810 F.2d at 466. This standard explains the language of Federal Rule of Civil Procedure 11, which is identical to the language of Rule 9011 of the Federal Rules of Bankruptcy Procedure as to certification. This Court finds that Mr. Mulligan's arguments were not well-grounded in fact or in law.

It is not necessary to determine whether a reasonable inquiry into the court-approved sale would have led an attorney to the provisions of Section 363 of the Bankruptcy Code. The pleadings filed by Mr. Mulligan in this adversary

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> which may be include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Id

proceeding on behalf of the plaintiff cited Section 363 and evidenced a familiarity with that and other Code provisions. The failure of the plaintiff and her attorney to obtain leave of this Court to file the state court action, and her failure to file a proper and timely challenge to the sale in the bankruptcy court is merely the latest attempt by Allnutt, his family and agents acting on his behalf to disrupt the ongoing proceedings in the bankruptcy court involving his bankruptcy estate.

A reasonable attorney in the circumstances of this case could not believe that this action, motivated as it was by malice, was factually or legally justified. Therefore, this Court finds that Mr. Mulligan committed willful and unethical misconduct in bringing this suit in the state court in the first place, and later by advocating its merits in the bankruptcy court, because in so doing, he advanced an unjust cause for lucre and malice. It was Mr. Mulligan who used his legal training to devise the fallacious entireties argument and who then employed sophistry, including the citation of authorities out of context, to support the claim.

As the represented party, the plaintiff is also subject to sanction. Fed. R. Bankr. P. 9011. "Quite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading." *Business Guides, Inc. v. Chromatic Comm. Enterprises, Inc.*, 498 U.S. 533, 548, 111 S. Ct. 922, 112 L.Ed.2d 1140 (1991) (finding the same standard of reasonable inquiry into the facts and law before filing applies to represented parties).

The primary purpose of sanctions is to deter future litigation abuse. *Robeson Defense Comm. v. Britt (In re Kunstler)*, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, 499 U.S. 969, 111 S.Ct. 1607, 113 L.Ed.2d 669 (1991). The other purposes of Rule 11 include punishing present litigation abuse, compensating the victims of the violation and streamlining court dockets. *Id.* The least severe sanction available that serves the purpose of the sanction should be imposed. *Cabell*, 810 F.2d at 466 (quoting Schwarzer,

Sanctions under the New Federal Rule 11, A Closer Look, 104 F.R.D. 181, 201 (1985)). Costs and attorney's fees, as well as fines, dismissals, reprimands and admonitions are among the sanctions a court may impose.

In addition to the authority of Rule 9011, this Court has the inherent power to impose sanctions against the plaintiff and her attorney in order to protect and maintain the authority and dignity of the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-6, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27, 46 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980).

Several factors enumerated by the Tenth Circuit in *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990), formed a part of the Fourth Circuit's analysis in *Kunstler*. In particular, the reasonableness of the opposing party's attorney's fees, minimum to deter, ability to pay and factors relating to the severity of the Rule 11 violation, should be considered when determining the amount of an appropriate sanction. *In re Kunstler*, 914 F.2d at 523. With this framework in mind, this Court makes the following determinations, which shall serve as the foundation upon which sanctions will be imposed.

Warnings by this Court to the plaintiff and her attorney before they dismissed the first suit were not sufficient to deter them from filing the instant suit. Mr. Mulligan was not deterred by this Court's public criticism of his conduct expressed in the form of a written opinion from which he took an appeal that he later dismissed in the case involving the race car assets. The plaintiff's actions, taken by her attorney, have unnecessarily prolonged the duration of the underlying bankruptcy case. The imposition of a monetary sanction is warranted as a deterrent to the debtor, his agents, or those purporting to act in his behalf, including Tracy E. Mulligan, from continuing to file similar suits in the future.

Relying upon its inherent authority to impose sanctions, as well as the specific authority conferred by Rule

9011, and in the exercise of its discretion, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed. 2d 359, 381-82 (19[illegible] and *Cox v. Saunders (In re Sargent)*, ___ F.3d ___, 1998 WL 57546 (4th Cir. 1998), this Court finds that the proper sanction that should be imposed as the minimum necessary to deter future litigation abuse is the reimbursement of the defendants' reasonable legal expenses generated in defending this groundless action. The imposition of sanctions in the amount of the defendants' reasonable costs and attorney's fees is necessary to deter future litigation and to educate the plaintiff and her attorney. The defendants[24] submitted affidavits delineating their respective legal expenses as follows:

Associates $ 34,988.36
Miller & Miller 4,962.63
Charles J. Miller, Inc. 2,527.52
Mark J. Friedman, + 24,450.50
Chapter 11 trustee
TOTAL $ 66,929.01

The disparity in the amounts claimed to have been expended by the four parties is attributable to the fact that counsel for the trustee and Associates bore the lion's share of the work in defending against the complaint. The plaintiff has never disputed the amount of the defendants' expenses.

This Court finds the foregoing amounts claimed as legal expenses by the defendants to be fair and reasonable under the circumstances of this case, particularly in light of the huge amount claimed as damages by the plaintiff in her groundless complaint. The plaintiff and her counsel will be ordered to reimburse to the defendants counsel fees and costs in the total amount of $66,929.01, as the defendants'

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[24] F. Thomas Rafferty, Esquire, counsel to the defendant, Urban N. Zink Contractors, Inc., did not file a request for reimbursement of counsel fees and expenses on behalf of his client.

legitimate expense in having to defend against this groundless suit.

The plaintiff has not provided any information to suggest that her financial condition is such that she will be unable to pay a monetary sum calculated to be the least severe but still act as a deterrent to future litigation. The sanctions imposed on the plaintiff are not calculated to unfairly restrict her access to the courts. Similarly, the attorney for the plaintiff has not presented any information to suggest that he is unable to pay a sanction calculated to be the least severe and yet continue to act as a deterrent to future abuse. The sanctions imposed on the plaintiff's attorney are not so large as to curtail his ability to practice law or cause him great financial distress. These sanctions are not being imposed in anger or in a spirit of vindictiveness, but in a sincere attempt to dissuade the debtor, the plaintiff, and their agents, assigns, and privies from attempting to undo the work of liquidating the debtor's estate.

WHEREFORE, sanctions will be imposed against Tracey E. Mulligan, Esquire, and Joanne A. Allnutt, plaintiff, jointly and severally, in the amount of $66,929.01, which is determined to be the amount necessary to compensate the defendants for their costs, attorneys' fees, and other charges incident to this groundless litigation brought by the plaintiff, which this Court has determined to have been filed and maintained without legal justification.

ORDERS ACCORDINGLY.

March 20, 1998 _____

/s/ James F. Schneider
U.S. Bankruptcy Judge

cc:
Mark J. Friedman, Esquire
Piper & Marbury
1100 Charles Center South

36 South Charles Street
Baltimore, Maryland 21201
Chapter 11 Trustee

Jeffrey L. Friedman, Esquire
Friedman & Kline
100 Owings Court, Suite 13
Reisterstown, Maryland 21136
Attorney for Miller & Miller Auctioneers, Inc.

Steven N. Leitess, Esquire
Leitess & Associates, P.A.
201 Pomona Square
1700 Reisterstown Road
Baltimore, Maryland 21208
Attorney for Associates Leasing, Inc.

Tracy E. Mulligan, Esquire
416 Hungerford Drive
Suite 216
Rockville, Maryland 20850
Attorney for Joanne A. Allnutt

F. Thomas Rafferty, Esquire
Blum, Yumkas, Mailman,
Gutman & Denick, P.A.
1200 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201-2914
Attorney for Urban N. Zink Contractors, Inc.

Elwood E. Swam, Esquire
1326 Main Street
P.O. Box 176
Hampstead, Maryland 21076
Attorney for Charles J. Miller, Inc.

Office of the U.S. Trustee
300 W. Pratt Street, Ste. 350
Baltimore, MD 21201

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re: FRED W. ALLNUTT, SR.,
Debtor.

JOANNE A. ALLNUTT,
Plaintiff.

v.

ASSOCIATES LEASING, INC., ET AL,
Defendants.

Case No. 92-5-7401
Chapter 11
Adversary No. 96-5598-JS
(Case No. 96-CA-32296 in the Circuit Court
for Howard County, Maryland.)

ORDER GRANTING THE CHAPTER 11 TRUSTEE'S MOTION TO INTERVENE, DENYING MOTIONS TO REMAND, GRANTING AND DEFERRING MOTIONS TO DISMISS, AND IMPOSING SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL

For the reasons set forth in the memorandum opinion filed simultaneously herewith, the motion to intervene filed by the Chapter 11 trustee, Mark J. Friedman, is hereby GRANTED. The motions of the plaintiff to remand this adversary proceeding to the Circuit Court for Howard County, Maryland, are hereby DENIED. The motions of the defendants to dismiss are hereby GRANTED, but DEFERRED, this Court reserving jurisdiction for the purpose of imposing sanctions against the plaintiff and plaintiff's counsel. The motion of the defendants for the imposition of sanctions against the plaintiff and plaintiff's

counsel is hereby GRANTED. Sanctions are hereby imposed against Tracey E. Mulligan, Esquire, and Joanne A. Allnutt, plaintiff, jointly and severally, in the amount of Sixty-six Thousand, Nine Hundred Twenty-nine Dollars, and one cent ($66,929.01), the amount determined to be necessary to compensate the defendants for their costs, attorneys' fees, and other charges incident to this groundless litigation brought by the plaintiff, which this Court has determined to have been filed and maintained without legal justification. The said amount shall be paid by cashier's check(s) made payable to the Clerk of the U.S. Bankruptcy Court for the District of Maryland within thirty (30) days hereof. The Court shall thereafter order the Clerk to disburse funds to the defendants in the respective amounts claimed.

SO ORDERED.
March 20, 1998 _____

/s/ James F. Schneider
U.S. Bankruptcy Judge

cc:
Mark J. Friedman, Esquire
Piper & Marbury
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
Chapter 11 Trustee

Jeffrey L. Friedman, Esquire
Friedman & Kline
100 Owings Court, Suite 13
Reisterstown, Maryland 21136
Attorney for Miller & Miller Auctioneers, Inc.

Steven N. Leitess, Esquire
Leitess & Associates, P.A.
201 Pomona Square
1700 Reisterstown Road
Baltimore, Maryland 21208
Attorney for Associates Leasing, Inc.

Tracy E. Mulligan, Esquire
416 Hungerford Drive
Suite 216
Rockville, Maryland 20850
Attorney for Joanne A. Allnutt

F. Thomas Rafferty, Esquire
Blum, Yumkas, Mailman,
Gutman & Denick, P.A.
1200 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201-2914
Attorney for Urban N. Zink Contractors, Inc.

Elwood E. Swam, Esquire
1326 Main Street
P.O. Box 176
Hampstead, Maryland 21076
Attorney for Charles J. Miller, Inc.

Office of the U.S. Trustee
300 W. Pratt Street, Ste. 350
Baltimore, MD 21201

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re: FRED W. ALLNUTT, SR.,
Debtor.

JOANNE A. ALLNUTT,
Plaintiff.

v.

ASSOCIATES LEASING, INC., ET AL,
Defendants.

Case No. 92-5-7401
Chapter 11
Adversary No. 96-5598-JS
(Case No. 96-CA-32296 in the Circuit Court
for Howard County, Maryland.)

PERMANENT INJUNCTION

As set forth in the foregoing memorandum opinion, pursuant to 11 U.S.C. §§105 and 363, provisions of the Chapter 11 trustee's confirmed plan of liquidation, and the inherent power of a court of equity in aid of its jurisdiction to properly administer the instant bankruptcy case, for the purposes of preventing the debtor from circumventing and negating the bankruptcy process in order to regain title to estate property validly sold by the Chapter 11 trustee and to enforce this Court's valid orders against the fraudulent and vexatious attacks by the debtor, the plaintiff and their counsel, this Court hereby enjoins the debtor, his insiders, heirs, assigns and agents, including the plaintiff and her attorney, from filing suits and/or instigating the filing of suits in state or federal courts attacking sales of estate property or seeking damages from the purchasers of said property.

WHEREFORE, the debtor, the plaintiff, and their insiders and agents, including his, her, or their attorneys, ARE HEREBY PERMANENTLY ENJOINED from filing lawsuits in state and federal courts contesting the validity of sales of property of the bankruptcy estate by the Chapter 11 trustee, without leave of this Court and subject to further severe sanctions.

SO ORDERED.
March 20, 1998 _____

/s/ James F. Schneider
U.S. Bankruptcy Judge

cc: Mark J. Friedman, Esquire

Piper & Marbury
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
Chapter 11 Trustee

Jeffrey L. Friedman, Esquire
Friedman & Kline
100 Owings Court, Suite 13
Reisterstown, Maryland 21136
Attorney for Miller & Miller Auctioneers, Inc.

Steven N. Leitess, Esquire
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416 Hungerford Drive
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Attorney for Urban N. Zink Contractors, Inc.

Elwood E. Swam, Esquire
1326 Main Street
P.O. Box 176
Hampstead, Maryland 21076
Attorney for Charles J. Miller, Inc.

Office of the U.S. Trustee
300 W. Pratt Street, Ste. 350
Baltimore, MD 21201

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2630
CA-98-1212-WMN
BK-92-57401-JFS
AP-96-5598-JFS

In Re: FRED W. ALLNUTT, SR.
Debtor

JOANNE ARMSTRONG ALLNUTT,
Plaintiff-Appellant,

v.

ASSOCIATES LEASING, INCORPORATED;
MILLER & MILLER AUCTIONEERS; INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,
Defendants-Appellees,

OFFICE OF THE US TRUSTEE,
Party-in-interest.

No. 98-2678
CA-98-1212-WMN
AP-96-5598-JFS
BK-92-57401-JFS

In Re: FRED W. ALLNUTT, SR.,
Debtor

JOANNE ARMSTRONG ALLNUTT,
Plaintiff-Appellee,

v.

ASSOCIATES LEASING, INCORPORATED,
Defendant-Appellant,

OFFICE OF US TRUSTEE,
Party-in-interest,

and

MILLER & MILLER AUCTIONEERS, INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,
Defendants.

ENTERED: APRIL 6, 1999
FILED: APRIL 6, 1999

On Petition for Rehearing and Rehearing En Banc

Appellant/cross-appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court of the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/_____

Patricia S. Conner
CLERK

CONSTITUTION OF TH UNITED STATES
AMENDMENTS OF THE CONSTITUTION
[AMENDMENT V]

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES BANKRUPTCY CODE
(TITLE 11 UNITED STATES CODE)

Sec. 101. Definitions

In this title –

***

(31) "insider" includes –

(A) if the debtor is an individual -

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

***

(37) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

***

(43) "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee;

***

(45) "relative" means individual related by affinity or consanguinity within the third degree as

determined by the common law, or individual in a step or adoptive relationship within such third degree;

***

(58) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

***

Sec. 102. Rules of construction

In this title –

(1) "after notice and a hearing", or a similar phrase -

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if -

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;
(3) "includes" and "including" are not limiting;
(4) "may not" is prohibitive, and not permissive;
(5) "or" is not exclusive;
(6) "order for relief" means entry of an order for relief;
(7) the singular includes the plural;
(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and
(9) "United States trustee" includes a designee of the United States trustee.

***

Sec. 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.
(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by

reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

***

Sec. 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) in the case of a transaction under this subsection, then -

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification,

unless the court, after such notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless -

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and

account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(d) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee

shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

***

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

In re:
FRED W. ALLNUTT, SR.,
Debtor,

Case No. 92-5-7401-JS
Chapter 11

JOANNE A. ALLNUTT, *
Plaintiff, *

v. *

ASSOCIATES LAESING, INC., *
et al.,
Defendants.

Adversary No. 96-5598-JFS
(Case No. 96-CA-32296 in the Circuit Court for
Howard County, Maryland)

AFFIDAVIT OF JOANNE ARMSTRONG ALLNUTT

I , the undersigned Joanne Armstrong Allnutt, a competent adult older than 18 years of age, do hereby file the following Affidavit:

1. That on January 10, 1958 I married Fred W. Allnutt.
2. That I have from January 10, 1958 to the present, remained the wife of Fred W. Allnutt.
3. That when I married my husband in 1958, neither of us owned any money or property.

4. That during our marriage, neither of us had any inheritance of any kind, nor have either of us received any significant gifts of money or property.
5. That all property described in the Complaint was obtained by us through our joint efforts during our marriage, and was jointly owned according to the legal principle of tenants by the entirety.
6. That in August, 1967, my husband and I started an excavation business that we named "Fred Allnutt Excavating".
7. That my husband and I started our excavating business with the purchase of a Caterpillar Traxcavator, a lowboy trailer, an International tractor, an automobile, a typewriter, and a file cabinet at a cost of $35,186.34.
8. To finance the start of our business, we used personal money saved during our marriage and also obtained a loan from First National Bank, Sandy Springs, Maryland, which I co-signed in the amount of $30,000 (Exhibit 1).
9. That these purchases, and the receipts from our business, were declared on our jointly filed Income Tax Return for the year 1967 (Exhibit 2).
10. That in 1968 my husband and I purchased a pick-up truck, a chain saw , a Case 450 dozer, and a transit at a cost of $12,399.80.
11. That these 1968 purchases, and the receipts from our business, were declared on our jointly filed Income Tax Return for the year 1968 (Exhibit 3).
12. That in 1969 my husband and I purchased a Case 450 dozer at a cost of $15,139.02. Financing was obtained from First National Bank, Sandy Spring, Maryland (Exhibit 4).
13. That this 1969 purchase, and the receipts from our business, were declared on our jointly filed Income Tax Return for the year 1969 (Exhibit 5).

14. That in 1970 my husband and I purchased a file cabinet, a pan, a Caterpillar loader, a 2-way radio, a pick-up truck, an Allis-Chamers dozer, and a Caterpillar grader at a cost of $38,615.39.

15. That these 1970 purchases, and the receipts from our business, were declared on our jointly filed Income Tax Return for the year 1970 (Exhibit 6).

16. That in 1971 my husband and I purchased at a cost of $151,856.86, four Caterpillar loaders, three pick-up trucks, two Caterpillar scrapers, a Chevrolet Vega automobile, a case dozer, a John Deere dozer, a compactor, two 2-way radios, a chain saw, and a set of tool boxes. Part of these purchases were paid from our personal funds and the balance was financed through First National Bank, Sandy Spring, Maryland (Exhibit 7).

17. That these 1971 purchases, and the receipts from our business, were declared on our jointly filed Income Tax Return for the year 1971 (Exhibit 8).

18. That in 1972 my husband and I purchased additional equipment at a cost of $124,098.53. Part of these purchases were paid from our personal funds. Additionally, a loan was obtained First National Bank, Sandy Spring, Maryland, which I co-signed (Exhibit 9).

19. That these 1972 purchases, and the receipts from our business, were declared on our jointly filed Income Tax Return for the year 1972 (Exhibit 10).

20. That between August 1967 and December 1972, my husband and I operated our excavating business from our home in Highland, Maryland, and during this time I performed all office functions for the business.

21. That in December 1972, on advice of certain professionals, my husband and I incorporate our business and changed our business name from "Fred Allnutt Excavating" to "Fred W. Allnutt, Inc."

22. That in January 1973, my husband and I placed all of our jointly owned assets relating to our excavation business into our new corporation. These assets including all vehicles, equipment, office furniture, jointly held operating capital, and accounts receivable.

23. That I thereafter continued to operate the business with my husband under the corporate name from our home in Highland and I continued to perform all office functions for the business.

24. That after incorporating our business in 1973, I continued to jointly borrow money by co-signing on loans to purchase vehicles and equipment to expand our business under the "umbrella" of our new corporation (Exhibit 11).

25. That in 1981, my husband and I ceased to operate our business as a corporation. Thereafter, we operated our business as "Fred W. Allnutt Excavating".

26. On the advice of financial professionals, my husband and I purchased all of the corporate assets from "Fred W. Allnutt, Inc.

27. That even though I had not received any compensation for my property when it was placed into the corporation in 1973, my husband and I jointly purchased those assets from the corporation in 1981-82.

27. That after purchasing the vehicles and equipment from the corporation, I continued to jointly borrow money with my husband to purchase additional vehicles and equipment (Exhibit 13).

28. That at no time have I knowingly relinquished or given up my ownership rights to the property I have obtained during the course of my marriage to Fred W. Allnutt.

29. That all of the property described in the Complaint is mine.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the forgoing paper are true.

Date: /s/ September 23, 1996

/s/ Joanne Allnutt

Joanne Allnutt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF THE
THE TAX INDEBTEDNESS OF FRED W. ALLNUTT, SR.

MARK J. FRIEDMAN, Trustee of Fred W. Allnutt, Sr.

v.

CHRISTOPHER ALLNUTT
JFC EXCAVATING SOVEREIGN
EQUIPMENT ASSOCIATION
CONSTITUTIONAL LEASING
ASSOCIATION ELLICOTT BUILDING ASSOCIATION

JFC EXCAVATING, et al.

v.

UNITED STATES OF AMERICA, et al

Chapter 11

CIVIL NO. S 92-2778
CIVIL NO. S 92-2834
(consol. with S 92-2778)

ENTERED: June 21, 1993
FILED: June 21, 1993

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, IT IS, this 21th day of June, 1993, by the Court, ORDERED and ADJUDGED:

1. That the motion of the Chapter 11 Trustee, for summary judgment BE, and it hereby IS, GRANTED;

2. That summary judgment BE, and it hereby IS, entered on all counts of the counterclaim and the third party complaint in favor of the bankruptcy trustee, and the Court DECREES that the assets in question (those levied upon by the IRS) are the assets of the bankruptcy estate of Fred W. Allnutt, Sr., in Civil No. S 92-2778;

3. That the motion of Herbert D. Howard, Trustee for Ellicott Building, for partial summary judgment BE, and it hereby IS, DENIED;

4. That the motion of the United States for summary judgment BE, and it hereby IS, GRANTED;

5. That summary judgment BE, and it hereby IS, entered in favor of the defendants and against the plaintiffs on all remaining issues in Civil No. S 92-2834 (the wrongful levy case);

6. That all interests of any party hereto other than the bankruptcy estate of Fred W. Allnutt, Sr., (subject to the rights of the United States Government in respect of his tax indebtedness) BE, and they hereby ARE, FORECLOSED as to the assets in question;

7. That this Order BE, and it hereby IS, entered as a final judgment, disposing of all remaining issues, claims, and parties in this case;

8. That costs be assessed in favor of the defendants in Civil No. S 92-2834 and in favor of the bankruptcy trustee in Civil No. S 92-2778; and

9. That the Clerk of Court mail copies of the foregoing Memorandum Opinion and of this Order and Judgment to counsel for the parties and to Mr. Fred W. Allnutt, Sr.

/s/ N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF THE
THE TAX INDEBTEDNESS OF FRED W. ALLNUTT, SR.

MARK J. FRIEDMAN, Trustee of Fred W. Allnutt, Sr.

v.

CHRISTOPHER ALLNUTT
JFC EXCAVATING
SOVEREIGN EQUIPMENT ASSOCIATION
CONSTITUTIONAL LEASING ASSOCIATION
ELLICOTT BUILDING ASSOCIATION
JFC EXCAVATING, et al.

v.

UNITED STATES OF AMERICA, et al

Chapter 11

CIVIL NO. S 92-2778
CIVIL NO. S 92-2834
(consol. with S 92-2778)

ENTERED: July 21, 1993
FILED: July 21, 1993

MEMORANDUM OPINION

This matter, which arises out of the failure of the Chapter 11 debtor, Fred W. Allnutt, Sr., to pay his income taxes for a number of years, see Allnutt v. Commissioner of Internal Revenue, 956 F.2d 1162 (4th Cir. 1992 Table) (text

in Westlaw) and see Court's Memorandum Opinion and Order in this case entered April 27, 1993, is before the Court on various motions for total or partial summary judgment. Although this case has generated a tremendous volume of paper, including a number of depositions and other exhibits submitted in support of various motions, oppositions, etc., as well as a number of interlocutory orders, the issues involved are simple and are entirely susceptible of summary disposition under Fed. R. Civ. P. 56(c), as interpreted in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. LibertV Lobby, Inc., 477 U.S-242 (1986). No oral hearing is required. Local Rule 105.6, D. Md.

It is, by now, well settled that summary judgment is to be awarded to a movant who properly applies for it under Rule 56, and who is clearly entitled to prevail at law, unless the opponent brings forth evidence that a reasonable fact-finder could use, under the appropriate proof burden, as a basis for finding in the opponent's favor. Celotex, supra, and Anderson, supra. In this case, there can be no possible genuine dispute of material fact, within the framework of Celotex and Anderson, and both the Internal Revenue Service (IRS) and the Chapter 11 Trustee have clearly demonstrated that they are plainly entitled to judgment in their favor as a matter of law. Fed. R. Civ. P. 56(c).

Although the plaintiff and Mr. Allnutt, Sr. have submitted a number of self-serving affidavits (some of them having frustrated defendants, discovery by fifth amendment privilege claims) in opposition to the pending motions, none of the assertions therein generates a genuine dispute of fact warranting trial on the cardinal issue, viz., where did the property of Fred W. Allnutt, Sr., subject to levy for his failure to pay taxes, go? The only answer that could be supplied by a reasonable fact-finder is that it went into hiding behind various "front" businesses assertedly run by his then young children and nominal trustees, but controlled and used by him as alter egos to frustrate and defeat the collection of taxes.

The Court's reasoning in support of its conclusions will be set forth very briefly below.

In the years prior to 1982, Mr. Fred W. Allnutt, Sr., owned and operated an excavation business, which was originally conducted as Fred W. Allnutt, Inc., which later became a sole proprietorship known as Fred W. Allnutt Excavating, and which later still became known as JFC Excavating. At all relevant times, the books, business methods, and key personnel of the business remained the same, and Mr. Allnutt, Sr., remained the boss, in substance, if not in title. Mr. Allnutt has stayed in the same office, has used his Social Security number to report payments to JFC to the IRS, and has, most significantly to this case, created a number of "common law trusts" or "associations" to which substantial business assets were transferred. Such assets, seized by the IRS, are the subject of the current litigation.

A number of records pertaining to Mr. Allnutt, Sr., and the various entities involved in these lawsuits have been destroyed, and others have admittedly been fabricated after the fact, as was admitted in certain depositions recanting perjured testimony. The so-called trusts were in the trusteeship of an individual who was sentenced to prison for failure to file state income taxes, and of a minister, both of whom essentially did nothing active in connection with the trusts, although they did apparently execute some minimal paperwork from time to time.

In short, the purported transfers of assets from Mr. Allnutt, Sr., to the various entities that brought this wrongful levy case were obviously shams and transactions calculated to evade the IRS as a tax creditor. The form of a transaction does not govern over the substance when federal tax issues are involved. See Gregory v. Helbring, 293 U.S. 465 (1935). Although it appears from the trust documents that Mr. Allnutt attempted to insert a third party "creator" into the organization of these "common law trusts'" viz., one Larry L. Courtney, the devices employed by Mr. Allnutt, Sr., to hide his assets from the tax collector are so transparently shams

and frauds that no reasonable fact-finder could give credence, by any known standard of evidence, to the wrongful levy plaintiffs' ownership claims to the property in question. Indeed, no factfinder functioning within the realm of normal intelligence and common sense, let alone guided by reason, could so find. The plaintiffs, motion for partial summary judgment is simply ridiculous in its claims of laches and is devoid of any arguable merit in contending for the bona fides of the various trusts and other sham transactions involved in this suit.

The Chapter 11 Trustee, in essence, seeks the same relief as the Government with regard to the title to the property, that is, the bankruptcy trustee essentially seeks a determination by the Court that the assets in dispute are, in fact, those of Mr. Allnutt, Sr., who placed himself within the aegis of the bankruptcy court by his Chapter 11 filing, which, not coincidentally, came the day after Senior Judge Northrop of this Court denied the plaintiffs, motion for interlocutory relief from the IRS seizure. The Court sees absolutely no point in the deposition of Mr. Friedman (the Chapter 11 trustee) other than to harass him and further delay this lawsuit.

In short, not only did the transfers of assets to the wrongful levy plaintiffs in this case have the badges of fraud, they reeked of it. No extended discussion of facts or law is required to support that conclusion, which is writ large all over the record of this case, to the extent of excluding any possibility that a reasonable fact-finder could determine otherwise.

Finally, the Court addresses the summary judgment motion of Mr. Howard, as Trustee of Ellicott Building. The motion is utterly specious on each and every ground raised therein, and, in the circumstances of this case, it comes perilously close to transgressing Rule 11. Therefore, it will be denied.

For the reasons stated, an order will be entered: (1) granting summary judgment on all counts of the bankruptcy

trustee's counterclaim and his third party complaints, in favor of the bankruptcy trustee, and decreeing the assets in question (i.e., those levied upon by the IRS) to be assets of the debtor Fred W. Allnutt, Sr. , in Civil No. S 92-2778 (the bankruptcy case); (2) granting summary judgment in favor of the defendants and against the plaintiffs on all remaining issues in Civil No. S 92-2834 (the wrongful levy case); (3) foreclosing all interests of any party to this suit, other than the bankruptcy estate of Fred W. Allnutt, Sr., (those rights being subject to the rights of the United States Government in respect of his tax indebtedness) to the assets in question; and (4) denying the partial summary judgment motion of Herbert D. Howard, as Trustee for Ellicott Building. That order will be entered as a final judgment, disposing of all the remaining issues, claims, and parties in this case.

/s/ N. Smalkin
United States District Judge

Dated: June 21th, 1993

Supreme Court, U.S.
FILED
AUG 17 1999
OFFICE OF THE CLERK

No. 99-132

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

JOANNE ARMSTRONG ALLNUTT,

Petitioner,

v.

ASSOCIATES LEASING, INCORPORATED,
MILLER & MILLER AUCTIONEERS, INCORPORATED,
URBAN N. ZINK CONTRACTORS, INCORPORATED,
MARK J. FRIEDMAN, CHAPTER 11 TRUSTEE,
CHARLES J. MILLER, INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT MARK J. FRIEDMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Petition for Writ of Certiorari (the "Petition") set forth "compelling reasons" as described in Supreme Court Rule 10 to warrant issuance of a writ of certiorari, i.e., does the Petition set forth a conflict among courts of appeals, an important federal question, a departure from the accepted and usual course of judicial proceedings or an important question of federal law?

2. Are the issues raised in the Petition moot when (i) the only interest Tracy E. Mulligan ("Mulligan") "pretending to act as petitioner" has in this case is that monetary sanctions were imposed against him and Joanne Armstrong Allnutt ("Joanne Allnutt"), the sole original plaintiff, jointly and severally, and (ii) the monetary sanctions were satisfied by Joanne Allnutt, who explicitly does not join in this appeal?

3. Does Mulligan have standing "pretending to act as petitioner" to petition this Court for review of an award of sanctions when (i) the only interest Mulligan has in this case is that monetary sanctions were imposed against him and Joanne Allnutt, the sole original plaintiff, jointly and severally, and (ii) the monetary sanctions were satisfied by Joanne Allnutt, who explicitly does not join in this appeal?

4. Does Mulligan have standing to (i) assert claims on behalf of Joanne Allnutt, his client, even though she undisputedly advised him not to petition this Court for review, or (ii) seek review of the sanctions imposed against Mulligan and Joanne Allnutt, jointly and severally, when the monetary sanctions were satisfied by Joanne Allnutt?

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OPINIONS AND ORDERS BELOW

April 6, 1999	Order denying Petition of Joanne Armstrong Allnutt for Rehearing and Rehearing en banc entered by United States Court of Appeals for the Fourth Circuit (Pet. App. 70-71).[1]
March 9, 1999	Order affirming decision of United States District Court for the District of Maryland, granting motion of Associates Leasing, Inc. for sanctions, granting motion of Associates Leasing, Inc. for extraordinary writ, and denying motion of Associates Leasing, Inc. for injunction entered by United States Court of Appeals for the Fourth Circuit (Pet. App. 1-3).

[1] References to Mulligan's Appendix will be referred to as "Pet. App. _____." References to the Trustee's Appendix will be referred to as "Resp. App. _____."

September 25, 1998	Memorandum and Order affirming March 20, 1998 and April 24, 1998 decisions of United States Bankruptcy Court for the District of Maryland, denying Joanne Armstrong Allnutt's motion for declaratory judgment and denying request of Associates Leasing, Inc. for additional sanctions relating to appeal entered by United States District Court for the District of Maryland (Pet. App. 4-8).
April 24, 1998	Order denying motion of Joanne Armstrong Allnutt to reconsider March 20, 1998 decisions entered by United States Bankruptcy Court for the District of Maryland.
March 20, 1998	Memorandum Opinion Imposing Sanctions Jointly Against Plaintiff and Plaintiff's Counsel in the Amount of $66,929.01 entered by United States Bankruptcy Court for the District of Maryland (Pet. App. 9-62) (reported at 220 B.R. 871 (Bankr. D. Md. 1998)).
March 20, 1998	Order Granting the Chapter 11 Trustee's Motion to Intervene, Denying Motions to Remand, Granting and Deferring Motions to Dismiss, and Imposing Sanctions Against Plaintiff and Plaintiff's Counsel entered by United States Bankruptcy Court for the District of Maryland (Pet. App. 63-65).

March 20, 1998	Order Entering Final Money Judgment in favor of Trustee and against Joanna Armstrong Allnutt and Tracy E. Mulligan in the amount of $24,450.50 entered by United States Bankruptcy Court for the District of Maryland.
March 20, 1998	Permanent Injunction against filing of lawsuits by Fred W. Allnutt, Sr., Joanne Armstrong Allnutt, and their insiders and agents, including Tracy E. Mulligan, contesting validity of sales of property of bankruptcy estate by Trustee entered by United States Bankruptcy Court for the District of Maryland (Pet. App. 66-68).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") was entered on March 9, 1999. The Fourth Circuit denied a petition for rehearing filed by Joanne Allnutt on April 6, 1999. On July 19, 1999, the instant Petition for Writ of Certiorari filed by Mulligan was docketed. In his Petition, Mulligan asserts this Court has jurisdiction over this matter under 28 U.S.C. § 1254(1), which allows this Court to exercise jurisdiction over a decision of a court of appeals upon the petition of a party to a case. Because Mulligan purports to be the petitioner, this Court has jurisdiction over this dispute only to the extent that Mulligan was a party in the Fourth Circuit case, i.e., this Court has jurisdiction only over the sanctions award.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

All relevant constitutional provisions, statutes and rules are set forth in Resp. App. 1-7.

COUNTERSTATEMENT OF THE CASE AND FACTS

The instant Petition for Writ of Certiorari (the "Petition"), although brought by Mulligan, has the hands of Fred W. Allnutt, Sr. ("Fred Allnutt") all over it. Fred Allnutt is a debtor in a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court"). In 1992, Respondent Mark J. Friedman was appointed the trustee for Fred Allnutt's bankruptcy estate (the "Trustee"). Simply stated, the Petition seeks review of the Bankruptcy Court's findings of fact and conclusions of law which culminated in an imposition of sanctions jointly and severally against Mulligan and Joanne Allnutt (the original plaintiff and Mulligan's client) for bringing what the Bankruptcy Court found to be a frivolous and bad faith lawsuit.

As determined by the Bankruptcy Court and elaborated on in the Bankruptcy Court's Memorandum

Opinion Imposing Sanctions Jointly Against Plaintiff and Plaintiff's Counsel (the "Bankruptcy Court Memorandum"), "[t]here is no doubt, based upon the record in this case, that the debtor [Fred Allnutt] is the sponsor of the instant lawsuit, as its true beneficiary and real party in interest." (Pet. App. 27). Here again, it is Fred Allnutt manipulating apparently his wife's former counsel, trying to use this purported appeal of the sanctions award as subterfuge to attempt to obtain review of the decisions below and to have the case reinstated in the state court.

Interestingly, Mulligan filed the Petition requesting review of the Bankruptcy Court's findings of fact, conclusions of law and imposition of sanctions imposed against him and Joanne Allnutt even though the sanctions

have already been satisfied by Joanne Allnutt. [2] Mulligan does not have the authority of Joanne Allnutt to petition this Court for review of the other issues raised in the Fourth Circuit case. As Mulligan admits, Joanne Allnutt instructed him not to appeal the Fourth Circuit's decision on her behalf. Nevertheless, the five issues identified in the Petition focus exclusively on the original plaintiff in this proceeding, Joanne Allnutt. Mulligan has no remaining personal interest at stake and therefore lacks standing to request review of the Fourth Circuit's decision. Furthermore, the issues asserted in the Petition are moot because the judgment appealed from has been satisfied. No case or controversy remains.

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[2] The Trustee recorded the judgment of the Bankruptcy Court in the Circuit Court of Maryland for Worcester County, where Joanne Allnutt is the sole owner of certain real property. The Trustee initiated post-judgment collection proceedings, and in March 1999, Joanne Allnutt paid in full the judgment in favor of the Trustee. The Trustee has made no attempts to collect the judgment from Mulligan.

The relevant facts are set forth in the Bankruptcy Court Memorandum. It would be duplicative to restate the relevant facts here, but following is a brief procedural summary:

- On September 27, 1996, Joanne Allnutt commenced the instant proceeding in the Circuit Court of Maryland for Howard County (the "State Court") for the second time suing certain good faith purchasers of property of the Debtor's bankruptcy estate and their transferees for conversion and detinue. The defendants removed the proceeding to the Bankruptcy Court.

- The Bankruptcy Court concluded that the lawsuit was yet another frivolous and unfounded lawsuit unjustly initiated by the Debtor, through his wife, against good faith purchasers of property of the bankruptcy estate.

- The Bankruptcy Court determined that the Trustee was a necessary party to the proceeding and allowed the Trustee to intervene.

- The record before the Bankruptcy Court culminated in the Bankruptcy Court's Memorandum Opinion Imposing Sanctions Jointly Against Plaintiff and Plaintiff's

Counsel in the amount of $66,929.01 (Pet. App. 9-62) which demonstrates the basis for the sanctions entered against Joanne Allnutt and Mulligan and in favor of the Trustee (Pet. App. 63-65). The Bankruptcy Court entered final money judgments in favor of the defendants and against Joanne Allnutt and Mulligan, jointly and severally, in an amount equal to the sanctions imposed. In addition, in light of the continuing efforts of the Debtor and his proxies (including Joanne Allnutt and Mulligan) to undermine the administration of the bankruptcy case and the Trustee's confirmed Plan of Liquidation, the Bankruptcy Court, pursuant to 11 U.S.C. (the "Bankruptcy Code") §§105 and 363, entered an order which stated:

> the debtor, the plaintiff [Mrs. Allnutt], and their insiders and agents, including his, her, or their attorneys, ARE HEREBY PERMANENTLY ENJOINED from filing lawsuits in state and federal courts contesting the validity of sales of property of the bankruptcy estate by the Chapter 11 trustee, without leave of [the Bankruptcy Court] and subject to further severe sanctions. (Pet. App. 66-68).

- Both the District Court and the Fourth Circuit affirmed the order imposing sanctions, the

final money judgments and the permanent injunction entered by the Bankruptcy Court.

- After dismissal of the appeal to the Fourth Circuit, in March 1999, Joanne Allnutt satisfied the judgment in favor of the Trustee.

The Trustee adopts the findings of fact and statement of the case set forth in the Bankruptcy Court Memorandum. Clearly, the sanctions award and permanent injunction issued by the Bankruptcy Court were warranted, and there is no reasonable basis for a review of the Fourth Circuit decision.

Because it is clear that the instant proceeding is a part of a pattern of abusive tactics and harassment of the Trustee and innocent third parties and a bad faith continuing effort to frustrate the administration of the bankruptcy estate and challenge the sale of the Debtor's property, the Trustee requests that this Court award him damages and costs.

ARGUMENT

The instant Petition has the hands of Fred Allnutt on it. The Petition is nothing more than an attempt by Fred

Allnutt to have the Bankruptcy Court's findings of fact and conclusions of law reviewed again. The Petition must be denied on four grounds: (1) the Petition fails to set forth "compelling reasons" for review of the Fourth Circuit decision by this Court, (2) the sanctions award is moot because it has already been paid by Joanne Allnutt, (3) Mulligan does not have standing to petition this Court for review because he has no personal interest at stake, and (4) Mulligan does not have standing to assert claims on behalf of Joanne Allnutt, who has undisputedly advised him not to proceed on her behalf. For these reasons, each of which is addressed below, the Petition must be denied.

I. The Petition for Writ of Certiorari Does Not Set Forth "Compelling Reasons" to Warrant Issuance of a Writ of Certiorari.

The Petition fails to set forth "compelling reasons" for review by this Court. Supreme Court Rule 10 defines "compelling reasons" as the following:

(i) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

(ii) A United States court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort;

(iii) A United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(iv) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; and

(v) A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. Review on a writ of certiorari is within the sole discretion of the Court. Id.

The questions presented by the Petition clearly do not fall within any of the "compelling reasons" enunciated by this Court. Instead, the Petition asserts that the Fourth Circuit erred in affirming the Bankruptcy Court Orders and, more specifically, asserts that the following findings of fact and conclusions of law are erroneous:

- The Bankruptcy Court's conclusion of law that the subject property was not owned as tenants by the entireties by the Debtor and Joanne Allnutt and that Joanne Allnutt had no interest the subject property. (See Questions Presented #1 and #2.)

- The Bankruptcy Court's conclusion of law that removal of the State Court proceeding was warranted and that remand must be denied because the State Court did not have subject matter jurisdiction to set aside the Bankruptcy Court-approved sale of the bankruptcy estate's assets. (See Question Presented #3.)

- The Bankruptcy Court's conclusion of law that it had subject matter jurisdiction over the proceeding because its outcome could substantially impact the administration of the Debtor's bankruptcy estate. (See Question Presented #4.)

- The Bankruptcy Court's conclusion of law that the Debtor's wife is an "insider" and an agent for the Debtor. (See Question Presented #5.)

All of the Questions Presented in the Petition allege erroneous findings of fact and misapplications of the law. However, such grounds for review are specifically excluded from appropriate grounds for relief. See Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). See also Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do

not grant a certiorari to review evidence and discuss specific facts.").

There is nothing novel about the Petition except the persistence of Fred Allnutt in seeking time and time again to (i) abuse and manipulate the courts, (ii) seek review of matters already decided and (iii) use proxies to promote his own agenda. The failure to set forth "compelling reasons" for review, as described in Supreme Court Rule 10, alone warrants denial of the Petition.

II. The Sanctions Award is Moot Because It Has Been Satisfied.

The sanctions award has been satisfied and there remains no case or controversy to be decided by this Court. Therefore, the issue whether the sanctions award was proper is moot.

It is well-established that a court may not consider an issue raised by a party unless a "case" or "controversy" is present and the party has a personal stake at interest. See

generally U.S. Const. art. III, § 2, cl. 1. Furthermore, "[t]his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit." Spencer v. Kemna, 523 U.S. 1, ____, 118 S. Ct. 978, 983 (1998) (citations omitted). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" Id. (citation omitted). See also Sosna v. Iowa, 419 U.S. 393 (1975) ("the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation").

Mulligan clearly has no personal stake in this case. The sanctions award – the only relief granted against him below – has been paid in full. There is no case or controversy remaining as to Mulligan. Therefore, the

Petition is moot. See, e.g., Verret v. Oil Transport Co., 365 U.S. 768 (1961) (remanding case to court of appeals to dismiss appeal as moot where judgment entered by district court had been satisfied).

As recently stated by this Court:

> [M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong. . . . We are confident that, as a general matter, district courts will prevent dilatory tactics by the litigants and will not unduly delay their own rulings; and that, where appropriate, corrective mandamus will issue from the courts of appeals.

Spencer v. Kemna, 523 U.S. 1, ____, 118 S. Ct. 978, 988 (1998). Because the Petition is moot, there is nothing for this Court to review. Therefore, the Petition should be denied.

III. Mulligan Does Not Have Standing to Petition This Court for Review.

A. Mulligan Does Not Have Standing to Petition This Court for Review of an Award of Sanctions that Has Already Been Paid by Joanne Allnutt.

Mulligan has no standing to petition this Court for review of the sanctions award because the sanctions have been paid by Joanne Allnutt. As discussed above, Mulligan's only interest in this lawsuit in the courts below is as a co-debtor on the sanctions award. However, because the sanctions were paid by Joanne Allnutt, Mulligan no longer has a stake in the lawsuit. There is therefore no matter regarding Mulligan for this Court to review. See, e.g., Verret v. Oil Transport Co., 365 U.S. 768 (1961) (remanding case to court of appeals to dismiss appeal as moot where judgment entered by district court had been satisfied).

B. Mulligan Does Not Have Standing to Assert Claims on Behalf of Joanne Allnutt Because She Undisputedly Advised Him Not to Petition This Court for Review.

The Petition seeks review of the Fourth Circuit judgment with respect to claims of Joanne Allnutt. However, Mulligan petitions this Court for review on behalf of Joanne Allnutt without her authority or permission. The Petition, in pertinent part, states "This petition is being filed by counsel for plaintiff below . . . The plaintiff . . . has instructed me not to proceed on her behalf." (Pet. 2). Without Joanne Allnutt's authority to petition this Court for relief, review of the Fourth Circuit judgment must be denied to the extent it purports to asserts claims on behalf of Joanne Allnutt.[3] See, e.g., Trans

[3] The Trustee notes that filing the Petition on behalf of Joanne Allnutt without her authority is also a clear violation of Model Rule of Professional Conduct 1.2(a), which states "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."

World Airlines, Inc. v. Thurston, 469 U.S. 111, 119 n.14 (1985) (concluding that Court did not have jurisdiction to consider question asserted by one party on behalf of another); Kapco Mfg. Co., Inc. v. C&O Enter., Inc., 886 F.2d 1485, 1494 (7th Cir. 1989) (concluding that attorney against whom sanctions had been imposed did not have standing to appeal substantive issues which his client had chosen not to appeal).

Furthermore, Mulligan was a "party" in the Fourth Circuit case only to the extent of the sanctions award. Therefore, he may not request that this Court invoke jurisdiction over any other matter pursuant to Section 1254(1) of Title 28 of the United States Code.[4] Section 1254(1)

[4] Although the caption on the cover page identifies Joanne Armstrong Allnutt as the petitioner, the opening paragraph of the Petition identifies Tracy E. Mulligan as the petitioner. See Pet. p.1 ("Tracy E. Mulligan, Esquire, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.").

provides that a case in a court of appeals may be reviewed by this Court by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Mulligan may seek review of the Fourth Circuit's decision only with respect to the sanctions award and, as discussed above, the sanctions issue is moot.

IV. The Petition is Frivolous and Wholly Without Merit and Therefore Damages and Costs Should be Awarded to the Trustee.

The Petition is frivolous and wholly without merit. The Trustee is therefore entitled to recover damages and single or double his costs incurred in connection with opposing the Petition. Supreme Court Rule 42 states "[w]hen a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43." The Trustee submits damages and

costs under Supreme Court Rules 42 and 43 are appropriate and justified.

The frivolous and "bad faith" nature of Mulligan's conduct is abundantly amplified by the record.[5] The Bankruptcy Court Memorandum in elaborate detail sets forth a description of Joanne Allnutt's and Mulligan's frivolous conduct. Just some of the elements relied upon by the Bankruptcy Court Memorandum are:

(i) Joanne Allnutt and Mulligan, especially in light of a prior State Court action which involved a challenge to the Trustee's sale of "race car assets" and was removed to the Bankruptcy Court, were aware that they could not prevail in the Bankruptcy Court on a "tenancy by the entireties" theory and yet again sought to initiate a challenge to a Trustee sale of property of the bankruptcy estate in a State Court that had no prior experience or background with the bankruptcy case.

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[5] The Bankruptcy Court Memorandum describes the "seemingly endless litigation in the state and federal courts over the past 14 years" initiated by Fred Allnutt and his proxies. (Pet. App. 11 fn.1; Pet. App. 23 fn.9, fn.10).

(ii) Joanne Allnutt's Complaint exhibited "a blatant disregard for the jurisdiction and authority of the federal courts."

(iii) This was the second frivolous lawsuit brought by Joanne Allnutt and Mulligan in which innocent parties were "haled into court to respond to groundless claims."

(iv) After removal to the Bankruptcy Court, Joanne Allnutt and Mulligan continued to insist the Adversary Proceeding was justified.

(v) Joanne Allnutt and Mulligan could not have had a reasonable basis for believing the adversary proceeding was justified or presented any questions of fact.

The Bankruptcy Court Memorandum summarized the basis for imposition of sanctions as follows:

> The instant complaint was filed in the state court in bad faith and without substantial justification, for the improper purposes of unreasonably [sic] delaying the administration of the Chapter 11 case, to frustrate the jurisdiction of the bankruptcy court by preventing the orderly liquidation of the debtor's estate, overturn decisions of the U.S. bankruptcy court and the U.S. district court, and harass and damage innocent parties whose only offense was to purchase estate assets from the trustee.

(Pet. App. 54). The Bankruptcy Court Memorandum elaborates upon its basis for the imposition of sanctions against Mulligan and cites to his various pleadings filed in the Bankruptcy Court without legal justification and his departure from "an objective standard of reasonableness." (Pet. App. 55-56). The Bankruptcy Court Memorandum determined that Mulligan was a willing participant in litigation clearly motivated by malice and "bad faith."

The Bankruptcy Court found Joanne Allnutt's and Mulligan's conduct so egregious that, in addition to the sanctions imposed pursuant to Federal Rule of Bankruptcy Procedure 9011(c), the Bankruptcy Court permanently enjoined Joanne Allnutt, the Debtor and their insiders and agents, including Mulligan, from filing similar lawsuits. (Pet. App. 66-67). The injunction's stated purpose is "to enforce [the] Court's valid orders against the fraudulent and vexatious attacks by the debtor [Fred Allnutt], the plaintiff

[Joanne Allnutt] and their counsel [Mulligan]." (Pet. App. 66-68). The Bankruptcy Court, recognizing that the injunction was extreme, found it necessary to "protect and maintain the authority and dignity of the court." For the reasons stated in the Bankruptcy Court Memorandum, this Brief, and the entire proceedings of the bankruptcy case, damages and costs incurred in relation to this Opposition should be awarded to the Trustee.

CONCLUSION

Although this lawsuit was originally brought by Joanne Allnutt, it was clearly sponsored by Fred Allnutt. Similarly, the instant Petition, although purportedly brought by Mulligan, has the hands of Fred Allnutt on it. It is telling that the Petition seeks review of the underlying claims initially addressed by the Bankruptcy Court. The Petition directly attacks the Bankruptcy Court's findings of fact and

conclusions of law and fails to set forth "compelling reasons" for review.

Furthermore, there is no case or controversy remaining and the issues on appeal are moot. The sanctions imposed by the Bankruptcy Court were paid by Joanne Allnutt; Mulligan has no remaining personal interest at stake.

In addition, Mulligan lacks standing to request review of any issues other than that of the sanctions award because he was not a "party" to the Fourth Circuit case with regard to any other issues. Mulligan also does not have standing to assert claims on behalf of Joanne Allnutt who undeniably expressed that she did not want to pursue an appeal of the Fourth Circuit decision. The Trustee respectfully submits that, under these circumstances, an award of damages and costs against Mulligan is justified.

WHEREFORE, for the reasons set forth herein, the record of the Fourth Circuit, the record of the District Court,

the Bankruptcy Court Memorandum and the record of the Bankruptcy Court, the Chapter 11 Trustee requests this Court enter an order denying the Petition for Writ of Certiorari and imposing upon Mulligan an obligation to pay additional sanctions to the Trustee in an amount equal to the costs of all legal fees and expenses incurred in connection with this Opposition.

Date: August 17, 1999

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APPENDIX

United States Constitution Article III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Supreme Court Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court' supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 42. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Supreme Court Rule 43. Costs

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by 28 U.S.C. § 2412, costs under this Rule are allowed for or against the United Sates or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.

Bankruptcy Rule 9011(c)

Sanctions. If, after notice and a reasonable opportunity to respond, the Court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion for reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

3. Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

CERTIFICATE OF SERVICE

I, William Roger Truitt, a member of the Bar of this Court, hereby certify that on this 17th day of August, 1999 three (3) copies of the foregoing Brief of Respondent Mark J. Friedman, Chapter 11 Trustee, in Opposition to Petition for Writ of Certiorari were mailed, first class postage prepaid to the following:

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I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
AUG 18 1999
OFFICE OF THE CLERK

No. 99-132

IN THE

Supreme Court of the United States

TRACY E. MULLIGAN, JR.,

Petitioner,

v.

ASSOCIATES LEASING, INC., MILLER & MILLER AUCTIONEERS, INC., URBAN N. ZINK CONTRACTORS, INC., MARK J. FRIEDMAN and CHARLES J. MILLER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATES LEASING, INC.

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to decide whether the United States Bankruptcy Court for the District of Maryland had subject matter jurisdiction over a state-court complaint challenging a bankruptcy court-authorized sale of property of the estate, when the bankruptcy court merely applied well-settled principles of law to a simple set of facts?

II. Was the United States Court of Appeals for the Fourth Circuit correct when it affirmed the decision of the United States District Court for the District of Maryland, which affirmed the Bankruptcy Court's imposition of sanctions against Petitioner and Joanne A. Allnutt for filing frivolous and meritless pleadings in the Bankruptcy Court?

III. Was the United States Court of Appeals for the Fourth Circuit correct when it found that Petitioner and Joanne A. Allnutt violated FED. R. APP. P. 38 and imposed sanctions in the amount of costs and attorneys' fees relating to the appeal from the District Court to the Court of Appeals?

PARTIES TO THE PROCEEDINGS BELOW

The parties below were Associates Leasing, Inc.; Miller & Miller Auctioneers, Inc.; Urban N. Zink Contractors, Inc.; Mark J. Friedman, Trustee in Bankruptcy for Fred W. Allnutt; Sr., Charles J. Miller, Inc.; Joanne A. Allnutt and Tracy E. Mulligan, Jr. The cover of the Petition for Writ of Certiorari indicates that Joanne A. Allnutt is the sole Petitioner in this matter. However, Mr. Mulligan indicates on page 1 of the Petition that he, not Mrs. Allnutt, is the Petitioner herein. Mr. Mulligan further states at page 2 of the Petition that Mrs. Allnutt "has instructed [him] not to proceed on her behalf."

STATEMENT PURSUANT TO RULE 29.6

Respondent Associates Leasing, Inc. is a wholly-owned subsidiary of Associates Commercial Corporation, which is a wholly-owned subsidiary of Associates Investment Company, which is a wholly-owned subsidiary of Associates Corporation of North America, which is a wholly-owned subsidiary of Associates First Capital Corporation. Associates First Capital Corporation is a publicly-held corporation, the shares of which are traded on the New York Stock Exchange. There is no other publicly-held corporation, or other publicly-held entity, that has a direct financial interest in the outcome of the litigation.

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STATEMENT OF THE CASE

A. Course of Proceedings

This case is an adversary proceeding arising out of a bankruptcy case entitled *In re Fred W. Allnutt, Sr.*, Case Number 92-5-7401-JFS (the "Bankruptcy Case"). Joanne A. Allnutt, a litigant in proceedings below, is the spouse of Fred W. Allnutt, Sr. On September 27, 1996, Mrs. Allnutt, through her attorney, Tracy E. Mulligan, Jr., filed a civil action (the "Complaint") in the Circuit Court for Howard County, Maryland (the "State Court") against Associates Leasing, Inc. ("Associates"), Miller & Miller Auctioneers, Inc., Charles J. Miller, Inc. and Urban N. Zink Contractors, Inc. (App. 23). In her Complaint, Mrs. Allnutt sued for conversion and detinue and claimed to be a "tenant by the entireties" with respect to certain heavy construction equipment sold pursuant to authorization given by the United States Bankruptcy Court for the District of Maryland – Baltimore Division (the "Bankruptcy Court") in the Bankruptcy Case (App. 23). Mrs. Allnutt also asked for a judgment against Associates for $19,720,464.74.

Associates, Miller & Miller Auctioneers, Inc. and Charles J. Miller, Inc. promptly removed the Complaint to the Bankruptcy Court, thereby commencing three adversary proceedings (App. 24-25). Upon Motion of Mark J. Friedman, the Chapter 7 Trustee (the "Trustee") in Mrs. Allnutt's husband's Bankruptcy Case, the Bankruptcy Court allowed the Trustee to intervene in the adversary proceedings and consolidated the adversary proceedings (App. 25). (Associates, Miller & Miller Auctioneers, Inc., Charles J. Miller, Inc. and the Trustee are hereinafter collectively referred to as "Defendants.")

Defendants filed several motions, including motions to dismiss the Complaint and motions for sanctions against Mrs. Allnutt and Mr. Mulligan (App. 25). Mrs. Allnutt also filed several pleadings in the Bankruptcy Court, including motions to remand the Complaint to the State Court and oppositions to the Defendants' various motions and the Trustee's motion to intervene (App. 25). The Bankruptcy Court entered an Order Consolidating Adversary Proceedings on February 13, 1998, consolidating the three adversary proceedings under the earliest-filed one, *Joanne A. Allnutt v. Associates Leasing, Inc.*, Adv. Proc. No. 96-5598-JS (the "Adversary Proceeding") (App. 25).

The Bankruptcy Court held a hearing with respect to all open motions on February 24, 1997 and on March 20, 1998, the Bankruptcy Court entered a Memorandum Opinion and Order (the "Memorandum Opinion") wherein the Honorable James F. Schneider ordered the following relief:

(1) Granting the Trustee's motion to intervene;

(2) Denying Mrs. Allnutt's motion to remand the Adversary Proceeding to the State Court;

(3) Granting Defendants' motions to dismiss the Adversary Proceeding(s); and

(4) Granting Defendants' motions for sanctions against Mrs. Allnutt and Mr. Mulligan, jointly and severally, in the amount of $66,929.01 (App. 63).

(5) Imposing a permanent injunction prohibiting Mrs. Allnutt, her husband and their insiders and agents from initiating any further lawsuits in state and

> federal courts contesting the validity of the Bankruptcy Court-authorized sale of Fred Allnutt's assets (App. 66).

The sum of $66,929.01 represented the aggregate amount of attorneys' fees incurred by Defendants in responding to and defending against the Complaint and Mrs. Allnutt's various other filings in this case (App. 59) from the date the Complaint was filed until the February 24, 1998 hearing.

After Mrs. Allnutt and Mr. Mulligan failed to remit $66,929.01 to the Bankruptcy Court as required pursuant to the Memorandum Opinion, the Bankruptcy Court entered orders on April 24, 1998 granting final money judgments against Mrs. Allnutt and Mr. Mulligan, jointly and severally, and in favor of Defendants for the respective amounts claimed by Defendants in their motions for sanctions (Mr. Mulligan omitted this judgment from his Appendix filed with the Petition.). Associates domesticated its final judgment, in the amount of $34,988.36, in several counties in the State of Maryland, and subsequently scheduled a sheriff's sale of certain real property owned by Mrs. Allnutt in Worcester County, Maryland for March 11, 1999 (the "Sheriff's Sale").

Mrs. Allnutt and Mr. Mulligan filed a joint appeal from the adverse summary judgment against Mrs. Allnutt and the permanent injunction and sanctions imposed upon both of them (App. 5). On September 25, 1998, the United States District Court for the District of Maryland (the "District Court") affirmed the findings and Orders of the Bankruptcy Court, but declined to impose additional sanctions upon Mrs. Allnutt and Mr. Mulligan (App. 7), apparently broadly construing a statement made by the Bankruptcy Judge that

if Mrs. Allnutt and Mr. Mulligan noted an appeal, sanctions would not be imposed merely because such an appeal was noted. Mrs. Allnutt and Mr. Mulligan appealed the District Court's affirmance of the Bankruptcy Court's rulings to the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals"). Associates filed a cross-appeal to the Court of Appeals, seeking a reversal of the District Court's decision not to impose sanctions upon Mrs. Allnutt and Mr. Mulligan on the basis of their frivolous appeal from the Bankruptcy Court.

In addition to its cross-appeal, Associates also filed a Motion for Sanctions against Mrs. Allnutt and Mr. Mulligan, and a Petition for Extraordinary Writ with respect to the anticipated proceeds of the Sheriff's Sale. On March 9, 1999, the Court of Appeals entered an order affirming the judgment of the District Court and granting Associates' Motion for Sanctions and Associates' Petition for Extraordinary Writ (App. 2). Mrs. Allnutt and Mr. Mulligan filed a Petition for Rehearing and Petition for Rehearing En Banc, which was denied by the Court of Appeals on April 6, 1999 (App. 70). On July 6, 1999, Mr. Mulligan filed a Petition for Writ of Certiorari with this Court.

B. Statement of Facts

On October 9, 1992 (the "Petition Date"), Fred W. Allnutt, Sr. filed a voluntary petition for relief pursuant to Chapter 11 of Title 11, United States Code (Title 11, United States Code is referred to as the "Bankruptcy Code" herein.) (App. 13). Fred Allnutt's bankruptcy filing allegedly was precipitated by an Internal Revenue Service ("IRS") seizure of the premises and assets of JFC Excavating ("JFC"), a business owned by Fred Allnutt (App. 12-13). The IRS seized

Fred Allnutt's property due to a tax assessment levied against Fred Allnutt but unpaid by him (App. 12). The items seized by the IRS included but were not limited to the equipment now claimed by Mrs. Allnutt in her Complaint (the "Property") (App. 13).

A review of the record in the Bankruptcy Case and the instant matter reveals that Mrs. Allnutt made no claim of any interest in the Property until almost four years *after* the IRS seized the Property. Mrs. Allnutt did not file a bankruptcy petition, nor did she commence or join other litigation related to the IRS seizure or the assets affected thereby, in which litigation her husband and at least two adult children were involved. The litigation included *Fred Allnutt v. United States,* Case No. S92-2778 filed October 2, 1992, involving twenty-three parties claiming interests in the Property (notably *not* including Joanne Allnutt), and a second case, *JFC Excavating v. United States,* Case No. S92-2834, filed October 7, 1992, involving five claimants (collectively, the "District Court Litigation"). Mrs. Allnutt's entire family and their various companies were fighting over ownership of the Property in an apparent attempt to assist her husband, Fred Allnutt, to evade certain federal taxes (App. 12). Mrs. Allnutt attended hearings concerning numerous competing claims to ownership of the Property, including claims lodged by her children (App. 27). Mrs. Allnutt also attended the hearing that resulted in the Bankruptcy Court's approval of the sale of the Property by the Trustee (App. 27). Despite her physical attendance at the various proceedings concerning ownership and disposition of the Property, and despite the embroilment of her entire family in numerous hotly-contested controversies concerning ownership of the Property, Mrs. Allnutt *never once* alleged any interest therein.

The District Court Litigation, assigned to the Honorable Frederic N. Smalkin of that Court, concerned Allnutt family allegations that Fred Allnutt did not actually own any of the assets seized by IRS (including the Property) (App. 15). The apparent purpose for the commencement of the District Court Litigation was to attempt to shield Fred Allnutt from tax liability related to his ownership of JFC (App. 15). On June 21, 1993, Judge Smalkin issued a Memorandum Opinion and Order and Judgment in the District Court Litigation wherein the Court found that the assets in question were indeed Fred Allnutt's assets, that the assets belonged to no one else, and therefore, were assets of the Fred Allnutt bankruptcy estate (App. 15-16).

Judge Smalkin further entered an order foreclosing all interests of the parties, other than the bankruptcy trustee and the IRS, to the assets in question (App. 15). Shortly thereafter, on September 29, 1993, the Bankruptcy Court entered an Order authorizing the sale by the Trustee of substantially all of the business operations and assets of JFC Excavating, free and clear of all liens and encumbrances (the "Sale Order") (App. 16). The sale was consummated in accordance with the Sale Order and substantially all of Fred Allnutt's business assets, including the Property, were sold (App. 18). Associates provided lease financing to Fred Allnutt's friend and new employer, Nicholas Mangione, to enable Mr. Mangione to acquire the Property for use in an excavating company that would employ Fred Allnutt and his sons.

On November 16, 1994, Mrs. Allnutt filed a lawsuit in Howard County Circuit Court against Metro Recovery, Ltd. and Charles V. Lewis, Jr., which case was removed to this Court (App. 23, n.10). Mrs. Allnutt sought to obtain

possession of certain of Fred Allnutt's other property that also was sold pursuant to the Sale Order. (*Id.*). Mrs. Allnutt dismissed that litigation on March 5, 1996. (*Id.*)

On September 27, 1996, the eve of the expiration of Maryland's three-year statute of limitations for certain causes of action and well after the expiration of the period for objecting to the Sale Order, Mrs. Allnutt filed the Complaint in this case alleging that Associates, Miller & Miller Auctioneers, Inc., Charles J. Miller, Inc. and Urban N. Zink Contractors, Inc. were in possession of certain Property which "is owned by the Plaintiff, Joanne Armstrong Allnutt as tenant by the entirety." (*sic*) (App. 24). Lodging claims based upon theories of conversion and detinue, Mrs. Allnutt demanded that Associates and its codefendants return the Property and compensate her for the deprivation of its use in the total amount of Sixty-one Million Seventy-nine Thousand Nine Hundred Eighty dollars and Ninety-seven cents ($61,079,980.97) (App. 24).

Associates immediately removed the Complaint to the Bankruptcy Court and moved to dismiss, as did the other Defendants (App. 25). The Bankruptcy Court treated Defendants' motions to dismiss as motions for summary judgment, and granted judgment as a matter of law in favor of Defendants (App. 47, 53). The Bankruptcy Court – echoing Judge Smalkin's strong words in the District Court Litigation – determined that the Complaint was "so transparently sham and fraudulent that no reasonable finder of fact could determine there to be a genuine dispute as to a material fact." (App. 52-53). The Bankruptcy Court also found that the filing by Mr. Mulligan and Mrs. Allnutt of a "frivolous and fraudulent claim" in the State Court, "a non-bankruptcy forum that did not enjoy a knowledge of

the history of the bankruptcy case," exhibited a "blatant disregard for the jurisdiction and authority of the federal courts" in this matter (App. 54). The Bankruptcy Court further found that Mr. Mulligan and Mrs. Allnutt committed knowing and intentional violations of FED. R. BANKR. P. 9011 by continuing to litigate their meritless, frivolous claims in the Bankruptcy Court despite warnings that to do so may result in the imposition of sanctions (App. 53-59). Mr. Mulligan and Mrs. Allnutt persisted, undeterred by the Bankruptcy Court's clear and unambiguous warnings. Therefore, the Bankruptcy Court imposed sanctions against Mr. Mulligan and Mrs. Allnutt, jointly and severally, in the amount of Defendants' reasonable costs and attorneys' fees (App. 59).

Mrs. Allnutt and Mr. Mulligan failed and refused to pay the amount of Associates' final judgment (the "Judgment") in the amount of $34,988.36. In connection with the Sheriff's Sale, Associates expended a considerable amount of money in enforcing the Judgment, including but not limited to attorneys' fees, advertising costs, auctioneer's fees, sheriff's fees, title reports and environmental reports. The total amount owed to Associates as of March 11, 1999 (the date of the Sheriff's Sale), pursuant to the Judgment and pursuant to the imposition of additional sanctions by the Court of Appeals, was $79,211.66. This amount was paid to Associates on the morning of March 11 in order to prevent the auction sale of certain real property in Worcester County, Maryland owned by Mrs. Allnutt. After receipt of payment of the $79,211.66, Associates filed Notices of Satisfaction in every jurisdiction in which Associates previously domesticated the Judgment, fully expecting that the Court of Appeals' ruling would finally bring closure to this case. Associates' expectations were proven to be wrong when Mr. Mulligan filed the Petition, on the last day of the period within which to do so.

SUMMARY OF ARGUMENT

This case does not present a conflict among the circuits, nor does it present any important issue that would warrant the granting of a Writ of Certiorari. Instead, it represents but the latest chapter in a long history of hostility towards the judicial system and innocent third parties by Fred. W. Allnutt, Sr., his family and associates. The saga of Fred Allnutt, his property and his career as a tax protestor has wound its way from the State Court, through the Bankruptcy Court, the District Court and the Court of Appeals for over six years. The issues and claims presented by the Petition have been, time and time again, determined to be completely and utterly without merit.

In accordance with SUP. CT. R. 16, Associates wishes to address the numerous misstatements of fact and law present in the petition that bear on what issues properly would be before the Court if certiorari were granted. Since Mr. Mulligan is the only petitioner, Associates avers that the only proper "Question Presented" is whether the lower courts properly imposed sanctions upon him. Of course, the other issues that deal with the merits of the Mrs. Allnutt's Complaint are relevant to the issue of the propriety of sanctions, but these are merely "sub-issues" that need not be addressed if this Court determines that the imposition of sanctions was factually and procedurally appropriate. This Brief in Opposition will deal largely with the reasons why the Petition should not be granted,

and not with Mr. Mulligan's arguments that go to the merits of Mrs. Allnutt's Complaint. For the sake of brevity, Associates incorporates by reference the Bankruptcy Court's Memorandum Opinion, found at App. 9.

The "Questions Presented" are also incorrect in several other areas. For instance, the first question posed by Mr. Mulligan ("Did the Court of Appeals err in approving sale from individual's bankruptcy estate of property in which a co-owner (wife) had an interest, without compensation to the co-owner?") is nonsensical, since the Court of Appeals, in its March 9, 1999 Order, said nothing about the sale of the Property by the Trustee. The Sale Order was entered by the Bankruptcy Court on September 29, 1993. Neither Mrs. Allnutt nor any other party objected to the entry of the Sale Order. The time period for such objection is long since expired and the Sale Order is not subject to review by any court at this point in time (App. 51). The other errors and misstatements contained in the Petition are addressed *infra*.

REASONS FOR DENYING THE WRIT

A.

THERE IS NO CONFLICT BETWEEN FEDERAL CIRCUITS; THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES OF BANKRUPTCY LAW IN DETERMINING THE ISSUES AND CLAIMS BEFORE IT.

In his Petition, Mr. Mulligan charges the Court of Appeals with "vitiat[ing] the protections accorded to a spouse as a joint owner of property with a bankrupt" by affirming the District Court's affirmance of the Bankruptcy Court's

grant of summary judgment against Mrs. Allnutt (Pet. 5). Contrary to these allegations, the Court of Appeals merely applied black-letter law to the facts before it and arrived at the inescapable conclusion that the Complaint was meritless and frivolous, and that Mrs. Allnutt and Mr. Mulligan were deserving of sanctions. This Court need look no further than Mr. Mulligan's Petition for ample evidence of behavior fully warranting the imposition of sanctions by the Court of Appeals and the Bankruptcy Court, which conduct also merits the further imposition of damages pursuant to SUP. CT. R. 42.2.

1. The Property sold by the Trustee was not "entireties property" and Mrs. Allnutt did not have a recognizable legal or equitable interest in the Property.

Mr. Mulligan first argues that Mrs. Allnutt possesses a joint interest, "presumably tenancy by the entireties in the Property described in the Complaint, started in 1967, and continuing through to the present time." (Pet. 7). This contention is wholly unsupported by the instant facts. As District Judge Smalkin stated in his Memorandum Opinion dated June 21, 1993, the assets of JFC, which includes the Property, were the sole property of Fred Allnutt (App. 15-16). The Property was never conveyed to the marital unit, and the four essential common law unities – time, title, interest and possession – never existed (App. 50). Therefore, Mrs. Allnutt was never a co-owner in the Property and the elements of a "tenancy by the entireties" do not exist.

Mr. Mulligan proceeds to expound on the general principles regarding property of a bankruptcy estate, and the status of entireties property with respect thereto.

Mr. Mulligan's recitation of the law is largely correct except when he applies it to the facts of this case. As he has since the filing of the Complaint, Mr. Mulligan fails or refuses to understand that the Property was never held by Mr. and Mrs. Allnutt as "entireties property." Mr. Mulligan never did and cannot now establish that the Property was owned by Mr. and Mrs. Allnutt as entireties property, and therefore the argument that Mrs. Allnutt has any rights therein must fail. Every court that has addressed the matter concluded that the Property was held by JFC, a sole proprietorship owned solely by Fred Allnutt (App. 51). Mr. Mulligan concludes this portion of his Petition with the following statement: "To the extent that the Court of Appeals departs from the foregoing principles to deprive a wife, who had a multi-million dollar interest separate from that of her husband, of her estate, the decision raises questions of discrimination, and introduces conflict among the Circuits." (Pet. 12). This statement disregards the facts and, once again, reflects Mr. Mulligan's ignorance of the law. Mrs. Allnutt cannot have an "interest separate from that of her husband" in entireties property. *Bruce v. Dyer*, 309 Md. 421 (1987). "[N]either spouse owns an undivided half interest in entirety property; the whole entirety estate is vested and held in each spouse and continues in the survivor." *Id.* at 427-428.

2. Even if Mrs. Allnut had an ownership interest in the Property, the doctrines of res judicata, collateral estoppel, equitable estoppel and waiver bar the Complaint.

Even assuming *arguendo* that Mrs. Allnutt had an ownership interest in the Property, which she obviously does not, the doctrines of waiver, res judicata, collateral estoppel and equitable estoppel are sufficient to justify the grant of

summary judgment by the Bankruptcy Court (App. 52). That being the case, Mr. Mulligan has no standing or legal right to bring the instant matter before the Court.

Under the principles of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion), Mrs. Allnutt is precluded from relitigating issues that have been fully and fairly tried in a prior proceeding, *i.e.*, the issue of Fred Allnutt's sole ownership of the Property. *First Union Commercial Corp. v. Nelson (In re Varat Enterprises, Inc.)*, 81 F.3d 1310 (4th Cir. 1996). As Mr. Mulligan correctly observes, there are three requirements for the application of *res judicata*: (1) there must be a valid final judgment on the merits in the prior adjudication; (2) the claim presented in the current action must be identical with the claim determined in the prior adjudication; and (3) the parties in the current action must be the same or in privity with the parties to the prior adjudication. *Kenny v. Quigg*, 820 F.2d 665, 669 (4th Cir. 1987). The doctrine of *res judicata* applies in the bankruptcy context. *Grogan v. Garner*, 498 U.S. 279 (1991); *In re Varat*, 81 F.3d at 1315.

In order for collateral estoppel to apply, the following requirements must be met: (1) there must be a valid final judgment on the merits in the prior adjudication; (2) the issue presented in the current action must be identical with the issue decided in the prior adjudication; (3) the party against whom collateral estoppel is asserted must be the same or in privity with the party to the prior adjudication; and (4) the party against whom collateral estoppel is sought must have had a fair opportunity to be heard with respect to the issue. *Combs v. Richardson*, 838 F.2d 112 (4th Cir. 1988). The doctrine of collateral estoppel applies in the bankruptcy context. *Id.*

Mrs. Allnutt undoubtedly is in privity with Fred Allnutt for purposes of *res judicata* and collateral estoppel as "there is sufficient identity between [Mrs. Allnutt and Fred Allnutt] to apply the principles of *res judicata* and give preclusive effect to the prior judgment." *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). As noted by the Bankruptcy Court,

> [t]here is no doubt, based upon the record in this case, that the debtor [Fred Allnutt] is the sponsor of the instant lawsuit, as its true beneficiary and real party in interest. As the wife of the debtor, [Mrs. Allnutt] is an insider who shares with him an identity of interest. 11 U.S.C. § 101(31).

(App. 27). In fact, a most telling incident occurred at the March 11, 1999 Sheriff's Sale – Mr. Mulligan appeared as Mrs. Allnutt's counsel to resist Associates' efforts to sell the Worcester County real estate and filed documents with the State court in an unsuccessful effort to stop or delay the sale. Accompanying Mr. Mulligan were Fred and Joanne Allnutt. Joanne Allnutt said almost nothing during the negotiations, all of which were conducted by Fred Allnutt through Mr. Mulligan. Shockingly, it was revealed that Mr. Mulligan failed even to inform his client, *Mrs.* Allnutt, of the prior evening's settlement negotiations, communicating instead only with her husband, Fred Allnutt.

Mr. Mulligan cites *Douglas v. First Security Fed. Sav. Bank, Inc.*, 101 Md. App. 170 (1994) and *Ungast v. LaFontaine*, 189 Md. 227 (1947) to support the proposition that Mrs. Allnutt was not in privity with Fred Allnutt, when, in fact, these cases point out the fallacy of Mr. Mulligan's arguments. The entire basis of the Complaint rests on Mr.

Allnutt's mistaken belief that she owned the Property as a "tenant by the entireties," a form of tenancy Associates previously demonstrated does not exist. Accordingly, if we follow Mrs. Allnutt's argument to its logical conclusion, she indubitably had a "direct interest in the subject matter of the [litigation regarding the Property]," and therefore was in privity with Fred Allnutt.

In addition to the doctrines of *res judicata* and collateral estoppel, there are two equitable principles which also served to bar Mrs. Allnutt from relitigating the issues presented in the Complaint. "The doctrine of equitable estoppel allows 'a person's act, conduct or silence when it is his duty to speak,' to preclude him from asserting a right he otherwise would have had against another who relied on that voluntary action." *In re Varat*, 81 F.3d at 1317, quoting BLACK'S LAW DICTIONARY 538. "Similarly, traditional waiver principles come into play when a party voluntarily or intentionally relinquishes a known claim right." *Id.* Mrs. Allnutt's conduct falls squarely within each of these principles.

In the District Court Litigation Judge Smalkin conclusively determined that the Property belonged to Fred Allnutt and thus was properly part of the bankruptcy estate. This fact enabled the Bankruptcy Court to exercise its authority to enter the Sale Order. Mrs. Allnutt attended numerous hearings concerning the ownership of the Property, including the hearing that resulted in the Sale Order. The Trustee previously testified that despite her presence at various proceedings involving the Property and others' competing claims of title thereto – including claims made by her own children to ownership of the same Property – at no time prior to the filing of the Complaint did Mrs. Allnutt

ever assert any interest in the Property (App. 27). Mrs. Allnutt waived any rights she had in the Property when she failed to assert them at the time that the Bankruptcy Court entered the Sale Order. Mrs. Allnutt's deliberate failure or refusal to participate in the litigation concerning the approval of the Sale Order, and her failure timely to appeal the Sale Order, precluded her from asserting her alleged ownership interests in the Property at three years later. *Veltman v. Whetzal*, 93 F.3d 517 (8th Cir. 1996).

3. The Bankruptcy Court and the Court of Appeals properly imposed sanctions upon Mrs. Allnutt and Mr. Mulligan on the basis of their violations of FED. R. BANKR. P. 9011 and FED. R. APP. P. 38.

In his second "Question Presented," Mr. Mulligan asks whether "the Court of Appeals err[ed] in affirming without comment removal by bankruptcy court and imposition of sanctions. . . ." (Pet. i). Mr. Mulligan apparently takes issue with the sanctions imposed only by the Bankruptcy Court, yet Associates will assume for the purposes of its brief in opposition that Mr. Mulligan also seeks reversal of the Court of Appeals' imposition of additional sanctions. In his Statement of the Case, Mr. Mulligan asserts that: (a) the Bankruptcy Court was not authorized to impose sanctions on the basis of the Complaint filed in the State Court; and (b) that he "fully met" the requirements of FED. R. BANKR. P. 9011 (Pet. 2).

The Bankruptcy Court imposed sanctions upon Mrs. Allnutt and Mr. Mulligan on the basis of the numerous pleadings they submitted to the Bankruptcy Court *after*

removal of the Complaint from the State Court.[1] This is in accord with the voluminous case law which holds that a party cannot be sanctioned in federal court for signing a state court complaint, but sanctions may be imposed for a party's post-removal conduct, including the filing of pleadings post-removal. *Meadow Ltd. Partnership v. Meadow Farm Partnership*, 816 F.2d 970 (4th Cir. 1987) (if, after removal of case, it is shown that a party continued to prosecute its claim and forced the opposing parties to defend the action in the federal court, sanctions may be imposed by the federal court); *Meadow Ltd. Partnership v. Heritage Sav. and Loan Ass'n*, 118 F.R.D. 432 (E.D. Va. 1987) (sanctions imposed for maintaining an action in federal court and filing a brief in opposition to a motion for summary judgment); *Herron*

1. A review of the Bankruptcy Court's docket shows that Appellants filed at least seven pleadings in the Bankruptcy Court after removal of the Complaint from State Court and prior to the February 24, 1997 hearing. Mr. Mulligan also orally advocated the positions presented therein at the February 24 hearing. The written pleadings, and the approximate dates of their filing, are as follows: Joanne A. Allnutt's Objection to Application to Remove and Motion to Remand Complaint to the Circuit Court for Howard County for Lack of Jurisdiction (1/16/97); Joanne A. Allnutt's Motion to Remand Complaint to the Circuit Court for Howard County for Lack of Jurisdiction and Objection to Application for Removal to the United States Bankruptcy Court for the District of Maryland (Baltimore) (1/21/97); Joanne A. Allnutt's Opposition to Chapter 11 Trustee's Motion to Intervene and to Consolidate Adversary Proceedings (1/24/97); Joanne A. Allnutt's Motion to Remand Complaint to the Circuit Court for Howard County, Maryland (1/27/97); Joanne A. Allnutt's Opposition to Chapter 11 Trustee's Motion to Intervene and to Consolidate Adversary Proceedings (1/27/97); Joanne Allnutt's Opposition to the Motion to Dismiss Complaint and Request for Sanctions Filed by the Defendant, Associates Leasing, Inc. (1/31/97); Plaintiff's Memorandum of Law in Reply to Trustee's Memorandum in Support of his Motion to Dismiss (2/24/97).

v. Jupiter Transp. Co., 858 F.2d 332 (6th Cir. 1988) (FED. R. CIV. P. 11 applies the instant the federal jurisdiction is invoked over the proceedings)[2]. "Once a case is removed, the plaintiff is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11." 858 F.2d at 335-36. Mrs. Allnutt and Mr. Mulligan continued to press their frivolous claims in the Bankruptcy Court "when a reasonably diligent inquiry at that time would have disclosed the complaint to be without support either in fact or law," *Id.*, and therefore the Bankruptcy Court had the authority to impose sanctions against them pursuant to FED. R. BANKR. P. 9011.

As the Bankruptcy Court noted in great detail in its Memorandum Opinion, Mrs. Allnutt and Mr. Mulligan violated FED. R. BANKR. P. 9011(b) in every manner possible (App. 53-60). "The instant cause of action is so transparently sham and fraudulent that no reasonable finder of fact could determine there to be a genuine dispute as to material fact." (App. 52-53). The Bankruptcy Court continued,

> [T]his Court finds that Mrs. Allnutt and Mr. Mulligan could not have held a reasonable basis for believing that the instant complaint was justified, or that it would generate serious issues of fact, particularly in light of their previous attempt to use the tenancy-by-the-entireties theory.

---

2. These cases were decided under FED. R. CIV. P. 11. The same analysis is equally applicable to FED. R. BANKR. P. 9011. *In re Heck's Properties, Inc.*, 151 B.R. 739 (S.D.W.V. 1992); *Matter of King*, 83 B.R. 843 (Bankr. M.D. Ga. 1988).

(App. 57). "The plaintiff's complaint exhibits a blatant disregard for the jurisdiction and authority of the federal courts, including the U.S. Bankruptcy Court, in which her husband, the debtor, voluntarily sought relief from debt." (App. 54). "[The attack by Mrs. Allnutt and Mr. Mulligan on the jurisdiction and authority of this Court] is an affront to the dignity of the judicial system, in bad faith, vexatious and wanton." (App. 54). ". . . Mr. Mulligan committed willful and unethical misconduct in bringing this suit in the state court in the first place, and later by advocating its merits in the bankruptcy court, because in so doing, he advanced an unjust cause for lucre and malice." (App. 57).

It is this same conduct that subjected Mrs. Allnutt and Mr. Mulligan to additional sanctions by the Court of Appeals. In language similar to that found in SUP. CT. R. 42.2, FED. R. APP. P. 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38. The term "frivolous" is not defined in the Federal Rules of Appellate Procedure, and courts of appeal considering this issue have used different terminology in determining whether an appeal is frivolous.

"Sanctions may be imposed when one party proceeds with an argument 'totally lacking in merit, framed with no relevant supporting law, conclusory in nature and utterly unsupported by the evidence.' " *Drexel Burnham Lambert Group, Inc. v. Claimants Identified on Schedule 1 (In re Drexel Burnham Lambert Group, Inc.)*, 995 F.2d 1138, 1147 (2nd Cir. 1993) *quoting United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381-82 (2nd Cir. 1982). "Sanctions are appropriate when the result of an appeal is obvious and the arguments of error are wholly without merit." *Mir v. Little*

Co. of Mary Hosp., 844 F.2d 646, 653 (9th Cir. 1998). "A frivolous appeal is one which 'involves legal points not arguable on their merits.' " *Travelers Ins. Co. v. Liljeberg Enter., Inc.*, 38 F.3d 1404, 1413 (5th Cir. 1994) *quoting Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985). In imposing sanctions upon Mrs. Allnutt and Mr. Mulligan, the Court of Appeals recognized that their appeal from the District Court was frivolous under any definition.

B.

THE CLAIMS AND ISSUES PRESENTED BY THE PETITION ARE NOT IMPORTANT FOR CONSIDERATION BY THE COURT, SINCE THE DECISION BELOW WAS FACT-SPECIFIC AND DOES NOT IMPACT ANY OTHER LITIGANTS.

There is no compelling reason to grant the Petition, as the ruling of the Court of Appeals turned upon the facts before it, and it will have absolutely no impact on any other parties who may find themselves in similar situations. Mr. Mulligan's Petition demonstrates that he does not now, nor did he ever understand the subject matter upon which he based the Complaint and subsequent pleadings and memoranda. It is clear that Mr. Mulligan filed his Petition simply because he had the ability to do so. "The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923). Mr. Mulligan (and perhaps the person who, from behind the scenes, likely has controlled the plaintiff's case from the beginning, Fred W. Allnutt, Sr.) views this Court simply as another appellate court towards which he can direct his utterly meritless and frivolous arguments in a last ditch attempt to extort

a settlement offer from Associates. No such offer was, nor will be forthcoming. Mr. Mulligan's conduct in this case suggests that Mr. Mulligan "considers the judicial system a laboratory where small boys can play." *Clark v. Florida*, 475 U.S. 1134, 1137 (1986) (Mem.) (Burger, C. J.).

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Mr. Mulligan has failed to demonstrate *any* reason, let alone a compelling reason, warranting the exercise of this Court's discretion to review the decisions below. There is no conflict among the courts of appeal with respect to any issues ruled upon by the Court of Appeals, the District Court or the Bankruptcy Court. Also notable by their absence are any important federal questions arising from the Court of Appeals' ruling.

As stated above, the only true "Question Presented" by Mr. Mulligan in his Petition is whether sanctions were properly imposed upon him (because only Mr. Mulligan, and not Mrs. Allnutt, is petitioning for a writ of certiorari). Mr. Mulligan failed to address in his Petition why this issue is deserving of the Court's consideration, apparently recognizing the futility of such an attempt. The Court should finally put a stop to the nearly three years of abuse of the legal system perpetrated by Mr. Mulligan, Fred and Joanne Allnutt since the inception of this case on September 27, 1996, and deny the Petition for Writ of Certiorari.

CONCLUSION

Wherefore, and for the reasons set forth above, Respondent Associates Leasing, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari and award Associates Leasing, Inc. just damages and double costs incurred in defending Petitioner's meritless and frivolous Petition for Writ of Certiorari.

Respectfully submitted,

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MOTION FILED
SEP 24 1999 99-132 (5)

In The
Supreme Court of the United States

JOANNE ARMSTRONG ALLNUTT,
Petitioner,

v.

ASSOCIATES LEASING, INCORPORATED;
MILLER & MILLER AUCTIONEERS, INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Motion for Leave to Intervene as Party Plaintiff

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3pp

MOTION TO INTERVENE AS PARTY PLAINTIFF
AND TO
JOIN IN THE PETITION FOR CERTIORARI FILED
BY PETITIONER

COMES NOW, Fred W. Allnutt, *in propria persona,* and moves this Court for an Order to join Fred Allnutt as a necessary Party Plaintiff in this action, and to join Fred Allnutt in the Petition for Certiorari filed by Petitioner, and as reasons therefore states as follows:

1. Joanne Armstrong Allnutt and Fred Allnutt were married in Maryland in 1958, and are husband and wife.

2. Joanne Allnutt claims the property that is the subject of this action in tenancy by the entirety with Fred Allnutt.

3. On October 9, 1992, Fred Allnutt declared personal bankruptcy in the Bankruptcy Court for the District of Maryland, and his separate interest was sold in the course of those proceedings to the extent allowed by law:

> For all of the above reasons, the court concludes that the debtor's undivided interest in property which he held immediately before the commencement of the case as a tenant by the entirety with his nonbankrupt spouse, as that tenancy is presently constituted under Maryland law, is property of the estate in bankruptcy under the Code, that the interest is subject to administration under § 541(a)(1), and that the tenancy by the entirety is not severed by the filing of a petition under the Code. In re

> Ford, 3 B.R.559, 571 (1980), AFF'd. 638 F.2d 14 (4thCir. 1981).
>
> Under 522(b)(2)(B) it is not the tenancy by the entirety property itself which becomes a part of the estate, but only the interest which the debtor held in such property immediately before the commencement of the case. Id., at 575.

4. Under tenancy by the entirety, a bankruptcy trustee takes custody of a debtor's undivided interest consisting of the same unities, intact and unaltered, as they existed immediately prior to filing of the petition, and administers them under § 541(a)(1). In re Ford, *supra*.

5. In his Memorandum Opinion Imposing Sanctions Jointly Against Plaintiff [Joanne Allnutt] And Plaintiff's Counsel [Tracy Mulligan] In The Amount of $66,929.01, (that is to say the order currently on appeal before this Court) entered on March 20, 1998, the Honorable James F. Schneider, United States Bankruptcy Judge, found:

> "There is no doubt, based upon the record in this case, that the debtor [Fred W. Allnutt] is the sponsor of the instant lawsuit, as its true beneficiary and real party in interest." (Main Case No. 92-5-7401-JS, Adversary No. 96-5598-JS, Bankruptcy Docket #33, page 22, "Conclusion of law," ¶ 1.

6. Even though Fred Allnutt regards Judge Schneider's finding to be error, Judge Schneider has ruled that Fred Allnutt is a real party in interest.

7. Fred Allnutt is not asking for his interest back in his own right.

8. Fred Allnutt's interest as tenants by the entirety is *pro forma*.

WHEREFORE, Fred Allnutt requests to intervene *pro forma* as a tenant by the entirety and custodian for the purchasers.

Respectively submitted,

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No. 99-132

(6)

Supreme Court, U.S.
FILED
SEP 23 1999
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TRACY E. MULLIGAN, ESQ.,
Petitioner,

v.

ASSOCIATES LEASING, INCORPORATED;
MILLER & MILLER AUCTIONEERS, INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply Brief to Appellee's Brief in Opposition of Respondent Associates Leasing, Inc.

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6 EPI

QUESTIONS PRESENTED FOR REVIEW

The Petitioner incorporates by reference the "Questions Presented for Review" in his Petition for a Writ of Certiorari and amends the "Questions Presented for Review" in the brief of Respondent Associates Leasing, Inc. as follows:

I. Should this Court grant certiorari to decide whether the United States Bankruptcy Court for the District of Maryland had subject matter jurisdiction over a state-court complaint challenging a bankruptcy court-authorized sale of property of the estate, when the bankruptcy court merely "applied well-settled principles of law to a simple set of facts", as posited by Respondent -- or

Did the United States Bankruptcy Court nullify well-settled principles of law and misinterpret the Federal Statute 11 U.S.C. sec. 363?

II. Was the United States Court of Appeals for the Fourth Circuit correct when it affirmed the decision of the United States District Court for the District of Maryland, which affirmed the Bankruptcy Court's imposition of sanctions against Petitioner and Joanne A. Allnutt for filing frivolous and meritless pleadings in the Bankruptcy Court, as posited by the Respondent Associates Leasing, Inc. -- or

a. Whether the Bankruptcy Court, the United States District Court or the United States Court of Appeals lacked subject matter jurisdiction over property after it had been sold out of the Bankruptcy estate, to provide the basis for award of sanctions, (or to take any other action in the case, other than to remand to the State Court).

b. Whether the aforesaid courts erred in holding the pleadings filed to be frivolous and meritless.

III. As stated, in Respondent's Brief.

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This Reply Brief addresses only matters raised in Respondent's Brief.

STATEMENT OF THE CASE

A. The Course of Proceedings

No comment.

B. Statement of Facts

[Respondent's Brief (Resp. Br. p 4-6)]. The Statement of Facts in the Appellee's Brief fails to show that Mrs. Allnutt was a party in any litigation with her husband as a "Tax Protester", or that she was involved with his attempted "evasion" of certain federal taxes.

There is nothing to show that Mrs. Allnutt joined in any attempted conveyance of the Property to any of the other participants whose activities are set forth in the "Statement of Facts."

(Resp. Br. p. 6). The "Statement of Facts" completely misstates the decision of Judge Smalkin by claiming that "the Judge found that the assets in question were indeed Fred Allnutt's assets, that the assets belonged to no one else, and therefore were assets of the Fred Allnutt bankruptcy estate. Judge Smalkin's Order is at App. 86-88; Memorandum Opinion, app 89-93. The Order and Memorandum speak for themselves.

The issue of whether the subject assets were held in sole ownership of Fred Allnutt, or as tenant by the entirety with a spouse, was not decided or addressed.

Judge Smalkin's Order was specifically limited in its scope to a decision to disposing of all interests "of any party hereto" (App. 87, ¶ 6). Joanne Allnutt was not a party.

Judge Smalkin's Order decreed "that the assets in questions (those levied on by the IRS) are the assets of the

bankruptcy estate of Fred W. Allnutt, Sr. in Civil No S 92-2778." (App. 87, ¶ 2)

Under 11 U.S.C. the assets included in the bankruptcy estate include property held either individually or in shared ownership to the extent of the debtor's interest only. 11 U.S.C. sec. 541 (a)(1)

(Resp. Br. p. 5) The statement that "Mrs. Allnutt attended hearings concerning numerous competing claims to ownership of the property including claims lodged by her children" is not supported by App. 27.

(Resp. Br. p. 7) The sale order was not final for appeal purposes until confirmed by the court on March 30, 1995. (App. 18) *Gekas v. Pipin (In the Matter of Met-L-Wood Corporation, Debtor)* 861 F.3d 1012, at 1016 (7th Cir. 1988)

The repeated references "as fact" that Counsel presented a "frivolous and meritless" claim on behalf of Mrs. Allnutt is not a "fact", but is the point at issue here.

SUMMARY OF ARGUMENT

The award of sanctions by the Bankruptcy Court (affirmed on appeals) is based upon a decision that has nullified previously established principles of law, introduced conflicts within the Circuits and has misinterpreted 11 U.S.C. sec. 363, specifically in the areas of subject matter jurisdiction after sale of property from a bankruptcy estate; the interpretation of a Core Proceeding; the basis for remand the responsibility of the trustee with regard to shared ownership of property; the power of trustee to sell jointly owned property; and the role of the Bankruptcy Court in protecting purchasers from the estate.

Petitioner's interest for jurisdiction. The petitioner has both a financial interest in the sanctions and interest in protecting his reputation and the opportunity for future employment in seeking reversal of the sanctions and the

judicially protected defamation accomplished by Judge Schneider. The financial interest is in unpaid awards to Miller & Miller ($4,962.63) and Charles J. Miller, Inc. ($2,527.52) plus interest (App. 59). Further, Counsel faces a claim for malpractice from the client for the more than $100,000.00 paid by the client for the awards to the Associates Leasing, Inc. and Mark J. Friedman Chapter 11 trustee. As to reputation, plaintiff was admitted to the bar of the District Court of the United States for the District of Columbia on November 8, 1940. He served as an officer in the United States Army for 28 years, retiring in 1970, having received, among other decorations, the Legion of Merit. In 1971, Counsel took and passed the Maryland bar examination and has been a sole practitioner since then with offices in Rockville, MD. The vicious defamation contained in the Memorandum Opinion of Judge Schneider (App. 53-60) was predicated (App. 26-27) on Counsel's refusing to accept the Court's personal assurance that his own court approved sale by the trustee was valid, when it appeared to Counsel, from an investigation of the facts and the law, that Mrs. Allnutt had a viable claim for ownership of the property (separate and apart from the business "JFC"), and that her interest in the property had been sold out of the bankruptcy estate in violation of 11 U.S.C. sec. 363 (h)(i)(j). Counsel denies any effort of harassment or misuse of the court process.

Resp. Br. 9. Respondent's "Summary of Argument" presents Mrs. Allnutt's claim as the latest in a long history of hostility toward the judicial system and innocent third parties by Fred W. Allnutt, Sr.; that his saga has wound its way in the court system for over 6 years. Apart from his "career as a tax protestor," many of the actions filed by Fred Allnutt since the bankruptcy was filed pertained to his efforts to obtain an accurate and complete accounting for the assets of the estate. The negligence and omissions in the accountings filed in the bankruptcy case have been set forth in a letter

dated 23 August, 1999 from Fred W. Allnutt, Sr. to Kevyn D. Orr, Deputy Director, Executive Office for United States Trustees, Department of Justice, 901 E Street, NW, Suite 700, Washington, DC 20530, showing a failure to account for more than $1,000,000 in the estate. (Exhibit 1 attached) A second letter to Kevyn D. Orr detailed irregularities in the administration of the race car assets. (Exhibit 2 attached) When a shortage of $600,000 in the account submitted by the trustee was brought to the bankruptcy court's attention, the court refused to require a reconciliation and approved the Chapter 11 trustee's filing. An extract of the court's hearing is attached (Exhibit 3).

REASONS FOR GRANTING THE WRIT

The decision in this case cuts across a large section of bankruptcy law and puts in issue, in conflict with other circuits, the role of the bankruptcy judge, the trustee, the purchasers from a bankruptcy estate, the rights of the debtor and co-owners, and the power of the trustee to sell jointly owned property without complying with the 11 U.S.C. sec. 363 (h)(i)(j), as hereinafter set forth.

The instant case denies the spouse of a debtor the opportunity to fairly and fully litigate her claim to tenancy by the entirety or other ownership of the property sold out of the bankruptcy estate; attributes to her "as an insider" equal responsibility for her husband's prior actions and litigation; and punished the Counsel and client for seeking a legal determination of her property rights by imposing *in terrorem* sanctions.

ARGUMENT

1. THIS CASE HAS INTRODUCED SERIOUS CONFLICTS AMONG THE CIRCUITS.

A. SUBJECT MATTER JURISDICTION

(1) OTHER CIRCUITS: The Bankruptcy Court loses subject matter jurisdiction over property when it is sold out of the bankruptcy estate. *Matter of Chicago, Rock Island and Pacific Railroad 794 F.2d 1182, 1188 (7th Cir. 1986)*

> That some land was once owned by a bankrupt does not supply federal jurisdiction of disputes concerning that land. New disputes--arising after the closure of the bankruptcy, *or after the land has been sold by the Trustee to a Third party*--must be resolved through the processes available for such independent disputes. When a bankrupt railroad (or any other bankrupt) sells property with the approval of the court, the buyer acquires title clear of all claims in the bankruptcy. The property may not be hauled back into the Estate, and the terms of the sales are inviolate in the absence of fraud or collusion. *In re Suchy*, 786 F.2d 900 (9th Cir. 1985); *In re Rock Industries Machinery Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978). The court's jurisdiction lapses with its control of the property. See also *Matter of Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990).

(2) THIS CASE. In contrast, the bankruptcy court here said, "The plaintiff's counsel argued that this Court no longer has subject matter jurisdiction over this controversy because the *res* in which the plaintiff is asserting an interest is no longer property of the bankruptcy estate. This Court disagrees. The cases that stand for the proposition that a bankruptcy court has no subject matter jurisdiction to decide questions of title to property after a

bankruptcy sale do not apply to the instant case which concerns lawsuits brought by debtors and their agents against purchasers of estate property during the pendency of the case. (App. 33)

B. DEBTOR'S PROPERTY IN THE BANKRUPTCY ESTATE

(1) OTHER CIRCUITS: The bankruptcy estate's rights in a debtor's property are limited to those rights had by the debtor. *Matter of Jones*, 768 F.2d 923 (7th Cir. 1985).

It is fundamental that the bankruptcy estate must have an interest in property as of the commencement of the case in order for the bankruptcy trustee to dispose of that interest. The Bankruptcy Trustee may only dispose of the debtor's interest in property which the debtor had as of the commencement of the estate. *In re Continental Airlines, Inc.* 780 F.2d at 1226 (5th Cir. 1986). See also *Sumy v. Schlossberg*, 777 F.2d 921 (4th Cir. 1985).

(2) THIS CASE. In contrast, the bankruptcy court first held that:

> The burden was upon the debtor and those claiming derivative rights to property of the estate through him to assert claims to that property against the right of the trustee to administer those assets during the pendency of the bankruptcy estate. Section 363(h) requires that a trustee who wishes to sell a co-owner's interest in property of the estate file an adversary proceeding against the co-owner prior to the sale of the co-owner's interest. 11 U.S.C. sec. 363(h). (App. 43, 44)

The bankruptcy court then held that:

> However, in the absence of knowledge of the existence by the trustee of a co-owner's claim, the trustee need not initiate a declaratory judgment action in the bankruptcy court to determine the nature of the debtor's ownership interest in property of the estate. Any rights the plaintiff may have had to claim an interest in property of the bankruptcy estate as the debtor's spouse were cut off when the property was sold by the Chapter 11 trustee after the debtor failed to exempt the property as that held by tenants by the entireties, and/or when the plaintiff, with full knowledge of the sale, failed to object to it. *Veltman v. Whetzal*, 93 F.3d 517,522 (8th Cir. 1996).

Veltman v. Whetzal is inapposite, because both husband and wife were parties in the bankruptcy, and agreements had already been entered into. The plaintiff in this case was never a party or witness, and received no notices from the court.

Obviously the trustee can sell co-owner's property if he did not know of co-ownership. In other circuits the remedy is a suit by co-owner in State Court. Under this case, the co-owner whose property is sold, has no remedy.

C. THE ROLE OF THE BANKRUPTCY COURT

(1) OTHER CIRCUITS. Once property has been sold out of the bankruptcy estate the bankruptcy judge has lost subject matter jurisdiction and has no further interest in the property. Judicial sales are on a *caveat emptor* basis. *Handlan v. Bennett* (51 F.2d 21, 4th Cir, 1931); *In re Brown*, 67 B.R. 635 (E.D.Ark, W.D., 1986).

(2) THIS CASE. In contrast, the bankruptcy court assumed subject matter jurisdiction over property that had been sold out of the bankruptcy estate and claimed an obligation to preclude the debtor's subsequent possession of the property even if only as beneficiary of the wife's ownership. Since the bankruptcy court had dispossessed the debtor of the property, only the bankruptcy court could restore the debtor to possession.

The Bankruptcy Court stated:

> During the pendency of a Chapter 11 proceeding, and in aid of its jurisdiction, the bankruptcy court having been clothed with the exclusive jurisdiction to deal with property of a Chapter 11 estate, has the inherent power to enjoin debtors, insiders and their agents, including attorneys, from attacking sales of estate property in State courts, to prevent a debtor from regaining title to estate property by circumventing and negating the bankruptcy process, to enforce its valid orders, and to prevent the debtor and the debtor's agents from injuring third parties by misconduct which is determined to be both fraudulent and vexatious. (App. 44-45)

Resp. Br. 11. Mrs. Allnutt's interest in the property. Mrs. Allnutt's claim to tenancy by the entireties (other co-ownership) is that the property was purchased with money jointly borrowed with her husband and jointly owned in tenancy by the entirety when the bank made the loan. This money was used to purchase the equipment. Tangible property purchased with funds owned in tenancy by the entirety are impressed with tenancy by the entirety status. *Beard v. Beard,* 185 Md. 178, 44 A.2d 469 (1945); *Brell v.*

Brell, 143 Md. 443, 122 A.635. Mrs Allnutt never conveyed her interest in the property and it remained in tenancy by the entirety.

2. RES JUDICATA, COLLATEAL ESTOPPEL, EQUITABLE ESTOPPEL AND WAIVER

Resp. Br. 12. The principles of the doctrines of res judicata, collateral estoppel, equitable estoppel and waiver do not apply.

(1) The claim presented in the current action is not identical with the claim determined in the prior adjudication, Mrs. Allnutt was not a party to the prior action. The issue of whether Mrs. Allnutt was a co-owner was not addressed or determined. Mrs. Allnutt's failure to assert her claim to co-ownership when the sale order was being presented was not a breach of duty to speak up. Mrs. Allnutt was a third-year high school drop out in 1957 to get married and some years later passed a G.E.D. examination for high school equivalency. She had no knowledge of the intricacies of bankruptcy and real estate law. Neither the court nor the bankruptcy trustee regarded her as of sufficient importance to summons or even to call her as a witness although she was right in front of them.

3. THE CLAIMS AND ISSUES PRESENTED BY THE PETITION ARE IMPORTANT FOR CONSIDERATION BY THE COURT.

Bankruptcy law is invoked by thousands of persons and businesses and every state of the union. By preempting bankruptcy for federal regulation, it was recognized that uniformity in its application and administration is a national objective. In *Gekas v. Pipin (Met-L-Wood Corp.)* 861 F.2d 1012, 1016 (7th Cir. 1988) the court noted that "under sec. 363, the trustee or debtor in possession is the seller and the

bankruptcy court gets involved only through the requirement of notice and hearing. Actually the statute fails to define the court's role clearly, but the practice is that the bankruptcy judge, following the hearing, will issue an order authorizing the sale (if he decides the property should indeed be sold), and after the sale is made he will issue a second order, confirming the sale."

Sanctions of an individual attorney in itself is of no consequence to this court, but if the bases for sanctions involved principles and decisions of a bankruptcy court at variance among the lower courts, review by this court is appropriate. The denial of the right of a wife to litigate her claim and imposition of over $100,000 in sanctions for filing for a judicial determination of her interest in property cannot and should not be sustained on the basis that she is inheritantly in privity with and bound by her husband's actions. The significance on women's rights in the legal system is sufficient that this case deserves review by this court.

CONCLUSION

Wherefore, the petitioner, Tracy E. Mulligan, respectfully request that this court grant petition for Writ of Certiorari.

Respectfully submitted,

Tracy E. Mulligan
Counsel of Record, Pro Se
416 Hungerford Drive
Suite 215
Rockville, MD 20850
(301) 340-9670

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EXHIBIT 1

Fred W. Allnutt, Sr.
10370 Baltimore National Pike
D-130, Suite 605
Ellicott City, MD 21042
Phone # 410-984-6476

August 27, 1999

Kevyn D. Orr, Deputy Director
Executive Office for Unites States Trustees
Department Of Justice
901 E Street, NW, Suite 700
Washington, DC 20530

Re : Case No. 92-5-7401, U.S.B.C., D. OF Md.

Dear Mr. Orr:

In our telephone conference of August 18, 1999, you requested copies of my correspondence with W. Clarkson McDow, Jr., the United States Trustee for Region Four, and other documentation that would support my claim that McDow and his panel trustee, Mark J. Friedman, have failed to comply with the laws and requirements pertaining to bankruptcy trustees. On August 18, 1999, I provided you a copy of my April 5, 1999 letter to Mr. Joseph Patchan, my May 6, 1999 letter to McDow, and the May 28, 1999 letter I received from McDow. At that time I confirmed that I would be sending you my other letters to McDow and the additional documents that support my claim. My other letters to McDow, including the three letters I faxed to you

on August 18, 1999, are attached to this letter (**Exhibits A through G**). The additional documents are outlined below.

However, before I demonstrate the overwhelming justification for an investigation and audit of my bankruptcy estate, I want to clear the air about myself and to point out the irrelevance of any attach *ad hominem* concerning my political views.

You may have already been told that I am a "tax protestor" who tried to defraud the government out of millions of dollars in taxes. If you have not yet been told this, you no doubt will be. However, nothing could further from the truth. I have had disagreements with the IRS regarding the applicability of the income tax law and, because I genuinely believed that the income tax law did not apply to me, I did not file 1040 returns for years 1981 to 1996. However, in 1997, I filed all 1040 returns for the 1981-1996 tax years, and I have timely filed for 1997 and 1998.

Due to legal technicalities beyond the scope of this letter, the Unites States Tax Court found me liable for a large amount of taxes for the 1981-1986 tax years, even though I owed no tax whatsoever for these years. On October 9, 1992, the IRS seized my business, forcing me to file bankruptcy. However, my views regarding the applicability of the income tax and the filing of returns are behind me now, and they are not either the purpose of this letter or the reason for my requesting an investigation and audit of my bankruptcy.

With these few words concerning my past behind me, I will now address the many problems concerning the accounting of my estate, the numerous undocumented wire transfers between the many different bank accounts, the hundreds of thousands of dollars of undocumented "write-off's" of debts owed to my estate without court approval, the lack of any formal accounting records for my estate, the lack of a final account of my estate's assets--and shows that there

exists evidence, valid evidence taken from court filing and other documents created by McDow's panel trustee, Mark J. Friedman, to support an investigation and audit of my bankruptcy estate.

I became concerned with the accounting of my estate's assets in September 1994, after I begin to notice discrepancies in the financial accounting, *i.e.*, the Monthly Operating Reports filed in my bankruptcy case by Friedman. The discrepancies I noted were:

1. Friedman was consistently reporting negative income.
2. Friedman's Monthly Operating Reports balances were different then the preceding Reports ending balance.
3. The total of the numerous bank balances listed in the Monthly Operating Reports did not equal the total cash amount shown in the Monthly Operating Reports.

On September 18, 1994, in an attempt to determine the extent of these discrepancies, I performed an analysis (**Exhibit H**) of the cash receipts and bank balances listed in the Monthly Operating Reports for the report period commencing August 1, 1993 and ending July 31, 1994. Through my analysis, I established that Friedman failed to report cash receipts of $596,532.02 during this reporting period.

After I informed Friedman of this discrepancy, I received an analysis dated September 29, 1994 (**Exhibit I**) from C.W. Amos, the accounting firm Friedman employed to

perform the accounting for my estate. In its cover letter, Amos stated, "Your analysis correctly identified a difference between the monthly charge in Accounts Receivable and the collection of cash. In our analysis we have identified the three different types of transactions that reconcile to the column in your schedule labeled 'Receivables Not Accounted For.'" Then, in its analysis, in the column titled, "Receivables Not Accounted For," Amos lists the amount of missing cash I showed on my analysis. In the column titled "Apparent Errors on Schedule," Amos identifies three errors in my analysis. In its column titled "Adjusted Receivables Not Accounted For," Amos shows $599,977.08 in cash is missing and unreported for the period August 1, 1993 to July 31, 1994, some $3,500 more than I determined in my 9/24/94 analysis.

In its other columns, Amos listed numerous dollar of swaps and write-offs (none of which are listed in Friedman's Monthly Operating Reports), and $12,192.00 under the heading "Allowance for Doubtful Accounts." Amos used these amounts to make its analysis balance. However, Amos did not provide supporting documentation for the swaps and write offs, nor explain how a "doubtful account" (receivables that may not or may not be received) can be used to balance out missing cash.

By letter to Amos dated September 29, 1994 (**Exhibit J**), I pointed out numerous inconsistencies in their September 29th analysis, and requested that they supply certain records to me. Amos, in lieu of answering my questions and providing me the records I requested, forwarded a second analysis dated October 4, 1994 (**Exhibit K**). Therein, Amos stated that it "understood" my "desire for more details" regarding "the changes in the accounts receivable balances from one operating report to the next" (Underline added). Amos' "second" analysis was obviously modified with the intent of reconciling the inconsistencies I noted in Amos'

"first" analysis. Some of the inconsistencies and discrepancies between Amos' first and second analysis are:

I. Monthly operating report period 11/1/93 - 12/31/93:

- ⇒ Amos' first analysis lists "A/P & A/R Swap" of $119,093.83.
- ⇒ Amos' second analysis lists "A/P & A/R Swap" of $218,641.00.
- ⇒ Amos' first analysis lists "Write-offs of Accounts Receivable" as $0.00
- ⇒ Amos' second analysis, which titled this category as "Reduction for Adjustments and Credit Memos," lists $85,783.
- ⇒ Amos' first analysis does not contain a category titled "Previously Unrecorded Sales."
- ⇒ Amos' second analysis contains a category titled "Increase For Previously Unrecorded Sales" and lists $164,095 in this category.
- ⇒ Amos' first analysis does not contain a category titled "Item not listed on Cash Receipts Schedule (Bracciale)."
- ⇒ Amos' second analysis contains a category titled "Item not listed on Cash Receipts Schedule (Bracciale)" and lists $2,297 in this category.

In just five days (September 29th to October 4th) that included a weekend, Amos created a second analysis and modified it sufficiently to establish a difference of $351,722.17 for this reporting period between the dollar values provided on the first analysis and the dollar valued provided on the second analysis. Both analyses covered the same reporting period. This alone established that neither Friedman nor Amos maintained proper accounting records in my estate--but there is more:

II. Monthly operating report period 1/1/94 - 1/31/94:

⇒ Amos' first analysis lists "Write-offs of Accounts Receivable" as $48,746.

⇒ Amos' second analysis, which titled this category as "Reduction for Adjustments and Credit Memos," lists $50,190.

⇒ Amos' first analysis does not contain a category titled, "Increase for Previously Unrecorded Sales."

⇒ Amos' second analysis contains a category titled "Increase for Previously Unrecorded Sales" and lists $900.00 in this category.

III. Monthly operating report period 2/1/94 - 2/28/94:

⇒ Amos' first and second analysis both list lists "A/P & A/R Swap" for this report period as $117,408, but they contradict the Monthly Operating Reports Friedman filed in this case. The Monthly Operating Report for the period 1/1/94 - 1/31/94 shows a total A/P balance of $121,888.18.[1] Of this amount, $13,390.50 was paid via checks issued by Friedman[2] and $25,953.39 remained unpaid.[3] By subtracting the $13,390.50 and the $25,953.39 amounts from the $121,888.18, we establish that the maximum amount Friedman could have swapped during this report period is $82,544.29. Therefore, the $117,708 amount Amos lists is wrong by at least $34,863.71

⇒ Amos' first analysis lists $17,435 in "Write-offs of Accounts Receivable."

⇒ Amos' second analysis, which titled this category as "Reduction for Adjustments and Credit Memos," lists $18,975.

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[1] See: monthly operating report for 1/1/94 - 1/31/94, Docket No. 295, page 10.

[2] See: monthly operating report for 2/1/94 - 2/28/94, Docket No. 304, page 22.

[3] See: monthly operating report for 2/1/94 - 2/28/94, Docket No. 304, page 9.

⇒ Amos' first analysis does not contain a category titled, "Increase for Previously Unrecorded Sales."

⇒ Amos' second analysis contains a category titled "Increase for Previously Unrecorded Sales" and lists $1,540 in this category.

IV. Monthly operating report period 3/1/94 - 3/31/94:

⇒ Amos' first analysis lists $19,946.87 in "Write-offs of Accounts Receivable."

⇒ Amos' second analysis, which titled this category as "Reduction for Adjustments and Credit Memos," lists $23,962.

⇒ Amos' first analysis does not contain a category titled, "Increase for Previously Unrecorded Sales."

⇒ Amos' second analysis contains a category titled "Increase for Previously Unrecorded Sales" and lists $3,745 in this category.

V. Monthly operating report period 4/1/94 - 4/30/94:

⇒ Amos' first analysis lists $7,786.62 in "Write-offs of Accounts Receivable."

⇒ Amos' second analysis, which titled this category as "Reduction for Adjustments and Credit Memos," lists $10,975.

⇒ Amos' first analysis does not contain a category titled, "Increase for Previously Unrecorded Sales."

⇒ Amos' second analysis contains a category titled "Increase for Previously Unrecorded Sales" and lists $2,443 in this category.

VI. Monthly operating report period 5/1/94 - 5/31/94:

⇒ Amos' first analysis lists $10,342 in "Write-offs of Accounts Receivable."

⇒ Amos' second analysis, which titled this category as "Reduction for Adjustments and Credit Memos," lists $10,882.

⇒ Amos' first analysis does not contain a category titled, "Increase for Previously Unrecorded Sales."

⇒ Amos' second analysis contains a category titled "Increase for Previously Unrecorded Sales" and lists $540 in this category.

Further, in each Monthly Operating Report Friedman filed for the 1994 calendar year reflects a negative "Contract

Revenue." However, this is incorrect. The following is a list of what was actually received by Friedman and what was actually reported in his monthly operating reports:

Report Period	Amount Actually Received	Amount Actually Reported
1/1/94-1/31/94	455,250.00	(48,746.00)
2/1/94-2/28/94	21,965.00	(17,435.00)
3/1/94-3/31/94	11,974.00	(19,947.00)
4/1/94-4/30/94	19,860.00	(8,531.00)
5/1/94-5/31/94	17,732.00	(10,342.00)
6/1/94-6/30/94	65,171.00	(183,362.00)
	592,192.10	(288,363.00)

Friedman misreported the "Contract Revenue" for this six-month period by $880,555.10. Friedman never raised his Monthly Operating Reports to correct this error, nor has he explained or justified how he arrived at this large discrepancy.

In each instance, the "Contract Revenue" reported by Friedman in his Monthly Operating Reports are the same amounts Amos listed on its first analysis as the "Write-offs of Accounts Receivable." (See column six on Amos' September 29, 1999 analysis, Exhibit I). This is either sheer stupidity, or there are no reliable accounting records existing in my estate.

On January 3, 1995, I received a third analysis from C.W. Amos (**Exhibit L**) that showed Adjustments/Credits of $275,869 in September 1994 and $12 in October 1994. A review of Friedman's Monthly Operating Reports revealed that none of the Adjustments/Credits listed on this analysis were listed in Friedman's Monthly Operating Reports.

On March 28, 1995, I received a fourth analysis from C. W. Amos (**Exhibit M**) that showed Adjustments/Credits of $3,452 in November 1994, $72,096 in December 1994, and $2,660 in January 1995. These adjustments/Credits are not listed in the Monthly Operating Reports filed by Friedman.

On August 29, 1997, I received a fifth analysis from C. W. Amos (**Exhibit N**) dated August 1997. While this analysis shows zero balance for each reporting period, it fails to list the $738,902 in Adjustments/Credits and non-listed items, and the $173,266 in unrecorded sales Amos listed in its earlier analyses, which makes those zero balances erroneous. Also, for the report period 1/1/94 to 1/31/94, Amos lists negative income of $61,482 while Friedman, in his Monthly Operating Report for this same report period, lists a negative income of $48,746, a difference of $12,736. Therefore, either Friedman's Monthly Operating Report or Amos' analysis, or both, are incorrect.

In an effort to justify the inconsistencies and the discrepancies in the Monthly Operating Reports, Friedman/Amos provided me with numerous ever-changing analyses that purport to summarize what happened to my estate's assets, but no actual accounting records to show what really did happen to those assets. Further, Friedman/Amos did not provide credible accounting records to the Kemplin Review Team for their review even though they were requested. Hence, it appears that neither Friedman nor Amos created proper accounting records for my estate that comply with Generally Accepted Accounting Principles (GAAP). If proper accounting records did exist, it would not have been necessary for Friedman's/Amos' to create the numerous analyses with the big dollar differences and conflicting amounts that they contain.

Review performed on accounting records prepared in accordance with GAAP would all arrive at the same conclusions and provide the same answers in each instance,

and any discrepancy or inconsistency noted could easily be traced and resolved. However, without a proper accounting, the discrepancies and inconsistencies in the financial records of my estate cannot be reconciled aside from an audit--as has been proven by the numerous analyses prepared by Friedman/Amos.

Friedman's/Amos' effort to explain away the accounting discrepancies in the Monthly Operating Reports through five (5) different ever-changing analyses is compelling proof that a proper accounting system does not exist.

The only conclusion to draw from the many hundreds of thousands of dollars of discrepancies in Friedman's Monthly Operating Reports, and Amos' analyses, is that no credibility can be given to any of Friedman's accounting and that a fraud audit is necessary to determine the disposition of my estate's assets.

The Kemplin Report

On November 18, 1994, I employed the Kemplin Group, an independent accounting firm, to contact an independent review of the financial records of my estate, and to evaluate the accounting system employed by Friedman/Amos. The Kemplin Group engaged in three other separate and independent professional accounting firm to make up the "Kemplin Review Team." On January 26, 1995, the Kemplin Review Team conducted their review and evaluation of my estate's records at the offices of C.W. Amos. Thereafter, the Kemplin Group issued a report titled the "Kemplin Report" (**Exhibit O**) wherein they identified many serious discrepancies in the accounting records, and

they also found that important accounting records did not exist. The Kemplin Group learned much from Michael L. Atkinson, who represented himself as "the Amos employee liaison to the team," and who stated that "he was responsible for the recording of all accounting activity related to the [Allnutt] Estate." Atkinson made the following asseverations to the Kemplin Group:

1. That when my estate was turned over to the trustee Friedman, Great Plains Accounting Software was being used.
2. That Friedman continued to use the Great Plains Accounting Software through April 30, 1993....
3. That my estate's historical computerized accounting system (Great Plains) was dumped and discarded in May 1993 in order to make room for a newly purchased Libra accounting system.
4. That there was no effort to retain any of my estate's historical records or system in any form.
5. That the Libra Software was used through 12/31/93 and then discontinued because of their [Amos'] inability to operate it.
6. That effective 1/1/94 trustee Friedman employed no automated accounting software.
7. That trustee Friedman retained the services of my bookkeeper, Joanne O'Connell, who continued to maintain the A/R cards.
8. That the A/R cards are the main source of all accounting transactions.
9. That no subsidiary ledgers and journals were being provided to the Kemplin Group because none existed.
10. That he routinely entered 'Accounts Receivable/Accounts Payable swap[1] transactions via telephone calls from Friedman.

The individual Affidavits of the Kemplin Review Team members (attached to Kemplin Report) document many inconsistencies and inaccuracies in the Monthly Operating Reports, and they attest to the lack of proper accounting books and records.

Cynthia Kemplin Affidavit

> "Records were found to be incomplete, inconsistent and inaccurate in many instances. Mr. Michael Atkinson was present. He attempted to be helpful in obtaining and explaining

> missing and incomplete records, but was unable to in most cases. Mr. Atkinson appeared to be embarrassed and apologized that the accounting was handled poorly. He claims to be responsible for all of the data entry on the Allnutt project.
>
> "Kemplin was unable to ascertain why there appear to be numerous discrepancies, inconsistencies, and errors in the accounting for the Allnutt Estate, due to not being provided complete accounting records.
>
> "Based on the information provided to us, Kemplin Group does not believe that it is possible for anyone to ascertain the accuracy of the accounts receivable.
>
> "It is apparent from the lack of follow through, cooperation and accountability on the part of Piper & Marbury and CW Amos, that without a formal audit of all of the records, that there will never be a proper accounting of where all of the funds have gone, if

they were all collected and if there was indeed mismanagement of funds and assets in this very complicated case, contrary to the fax we received in this office January 17th, 1995 from Mr. Mark, Friedman and his letter in response to our March 1st request for production of documents and historical records (from 1981 thru present) not received at the field review, March 6st, 1995.

"Mr. Friedman's present position appears to be that he will provide no other information pertaining to this case, including that which he has already promised." [End quotation]

Jeffrey M. Coleman Affidavit

"I noted a small transposition error on the court forms and was unable to tie in the A/R (see Schedule). When I requested an explanation from Mr. Atkinson, he refused to answer my questions.

"Without seeing all of the information that exists, it is difficult to draw a conclusion as to the propriety of the information. At the least, I would note that the accounting firm, under the direction of the Trustee, has expended a lot of money in professional fees and have not been able or willing, to share that information. To redo the computer system, spend $300,000 to $500,000 in accounting fees and not to have complete sets of books and records and good accounting workpapers is a mystery to me. Similar companies would be able to manage their business for much less.

"Trustee kept their own bank accounts, monies were transferred in and out though the time period.

"The Accounts Receivable reports submitted to the bankruptcy court for the period October 1992 through November 1994, reflected discrepancies of $1,860,072 between beginning and ending balances, per the attached report." [End quotation]

Mr. Coleman, to support his finding that $1,860,072 was missing from my Estate's Accounts Receivable from October 1992 through November 1994, attached a manual spreadsheet (**Exhibit P**) to his Affidavit. I duplicated Coleman's spread sheet on a computer spread sheet **Exhibit P**) and found two errors that adjusted the missing accounts receivable amounts to $1,850,573. I have duplicated Coleman's spreadsheet with my corrections:

Reporting period	A/R Begin	Billings	Collections	Other	A/R Ending	Difference
Oct 9 to Dec 31, 1992	2,594,632	1,642,739	1,502,181	0	2,524,426	210,764
Jan 1 to Apr 30, 1993	2,524,426	2,169,332	2,169,332	0	2,188,365	314,932
May 1 to July 31, 1993	2,188,365	2,956,248	1,733,464	0	2,654,560	756,589
Aug 1 to Oct 31, 1993	2,654,560	2,249,519	1,429,843	377,501	3,078,741	17,994
Nov 1 to Dec. 31, 1993	3,078,741	107,408	433,416	0	2,528,283	224,450
Jan 1 to Jan 31, 1994	2,528,283	48,796	455,414	0	1,958,797	162,868
Feb 1 to Feb 28, 1994	1,958,797	17,435	25,902	0	1,801,989	148,341
Mar 1 to Mar 31, 1994	1,801,989	19,947	39,975	0	1,770,068	11,893
Apr 1 to Apr 30, 1994	1,770,068	(6,693)	21,698	0	1,741,676	1
May 1 to May 31, 1994	1,741,676	(9,510)	18,565	0	1,703,235	10,366
June 1 to June 30, 1994	1,730,235	0	66,832	183,362	1,454,161	(1,120)
July 1 to July 31, 1994	1,454,161	0	0	0	1,454,161	0
Aug 1 to Aug 31, 1994	1,454,161	0	15,200	0	1,448,961	10,000
Sept 1 to Sept 30, 1994	1,448,961	0	160,922	276,869	1,011,170	0
Oct 1 to Oct 31, 1994	1,011,170	0	14,500	12	996,658	0
Nov 1 to Nov 30, 1994	996,658	0	7,813	3,452	981,898	3,495
					Total	1,850,573

Melvin E. Casby Affidavit

"C.W. Amos ceased using Libra accounting system effective December 31, 1993. C.W. Amos did not use an automated accounting software system from January 1, 1994 until January 26 1995, time of Kemplin Group accounting analysis. When I asked Mr. Atkinson, of Amos to provide a 1994 general ledger, he said, 'we closed 1993 with Libra and did not maintain its general ledger.' I then asked for the manual general ledger that replaced the automated general ledger, at which Mr. Atkinson responded, 'we did not maintain-a general ledger in any form after December 31, 1993.' I then asked how then could he prepare financial statements, and he responded, 'we use the accounts receivable cards and subsidiary journals.'

"Trustee provided list of 8 accounts receivable that had been written off that totaled $597,084. The posting of only two of the accounts could be verified on the accounts receivable cards provided. They were Ratrie Shipquarters for $178,659 in June 1994 and New Panorana Development Corporation for $31,813 in September 1994, Leaving Pulte for $57,084 in November 1993; Bituminous Construction for $27,068 in January 1994; Bituminous (Hanover II project) Construction (Hanover III project) for $15,376 and $1,293 in January 7, 1994; Heritage Heights Limited Partnership for $46,374 in September 1994; Olney Land Limited Partnership for $165,584 identified and $79,403 that was not identified in September 1994; and Kennard Warfield for $70,596 in December 1994 totaling $462,778, or 77.5% of reported write-offs

were unable to be verified to and supported by the accounts receivable cards provided.

"Additionally, while searching the accounts receivable cards, I discovered an unidentified $42,430 credit posted to Lou Spicer on the Fallstone project indicating that not all write-offs in excess of $10,000 was provided to us for review as indicated by trustee.

"Also while reviewing the accounts receivable cards I discovered a $2,783.50 credit issued to Valley Enterprises with the explanation of duplicate billings. However, there were only two debits posted to the accounts receivable card totaling $2,783.50 making it impossible to involve duplicate billings unless another receivable was kept and not provided for review.

"Requested and approved documentation was not present at the January 26, 1995 meeting for review and analysis.

"Source documents for adjustments, write-offs, and payables/receivables off-sets were not available to verify accuracy and correctness of adjustments, write-offs and off-sets.

"Accounting policies and procedures for the Allnutt Estate fail to conform to standards required of the Generally Accepted Accounting Principles." [End quotation]

Wayne L. Greenfeld Affidavit

> "Upon request, Mr. Atkinson indicated that all computer related activity ceased effective 12/31/93 and if any other reports were run, they would have been used via diskette, then discarded. He also indicated that he was unable to provide us any standard accounting records for activity since 1/1/94, stating that some journals may exist but the A/R cards are the main source of the accounting transactions and that he would initiate swap transactions regularly via telephone calls from Mr. Friedman.
>
> "Item #1, Pulte re: Christie $58,865 - Since the A/R card doesn't contain a general ledger reference, and the general ledger consists of undated, summary CR (Cash Receipt) entries, I was unable to trace the transaction to the general ledger. I was unable to trace the rest of the items since the write-offs occurred after 12/31/93, the last report date of general ledger activity provided to me." [End quotation]

McDow's Review Of Financial Records

Recently, *via* a Freedom of Information Act request, I received from McDow and undated, unsigned, and unpublished "Summary of Review Of Financial Records of Mark J. Friedman, Trustee for Fred W. Allnutt, SR. Case No. 92-5-7401-JS" with exhibits (**Exhibit R**). To help identify certain specific pages therein, I added page numbers to the lower left corner of each page and will use those page numbers as reference.

It is clear from this Summary, and the exhibits attached to it, that the bankruptcy analysts working for McDow did not review any accounting records. Some "records" were provided to McDow's analysts (Exhibit R, pages 2 and 6), but they were not accounting records that summarized Friedman's financial transactions. Some of the records were simply underlying documents that would support individual entries to the subsidiary accounting ledgers and journals, but they would not qualify as accounting records. McDow's analysts should have demanded to see and review the General Ledgers, and Journals. A proper and meaningful review would consist of:

- ⇒ Reviewing the Balance Sheet and Income Statement to determine that they balanced.
- ⇒ Verifying that the statement of cash flows balances to the Balance Sheet.
- ⇒ Reconciling the subsidiary ledgers to the Balance Sheet.

- ⇒ Reconciling the cash account to the bank statements.
- ⇒ Reconciling the accounts receivable (A/R) balance and the accounts payable (A/P) balance to the A/R and A/P ledgers.
- ⇒ Verifying the A/R balance by taking the beginning A/R, add the sales (from the Sales Journal), subtract the cash receipts (from the Cash Receipts Journal), and add or subtract approved adjustment to arrive at the ending A/R. McDow's analysts would than have to determine if proper

internal control were maintained over the A/R. For example, they should determine if the positions or duties for cash collections, record payments and cash receipts, and write-offs or adjustments were kept separate.[4]

⇒ Verifying the A/P balance by taking the beginning A/P, subtract the cash disbursements (from the Cash Disbursement Journal), add the purchases (from the Purchase Journal), and add or subtract approved adjustment to arrive at the ending A/P. Here, it is not necessary that A/P duties are assigned to separate persons as long as someone else signs the checks besides the person who writes the checks and does the write-offs.[5]

⇒ After confirming that the ledgers and journals agree, test the validity of the entries by testing a sample of cash receipts, disbursements, sales invoices, and purchase invoices to determine if statistically everything is okay. For items over a certain dollar amount, say $10,000, every item would be checked (This would have allow McDow's analysts to say that the accounting records are materially correct). A review has a lot less sampling, questioning, and testing than an audit. However, as is the case with Friedman, the greater the lack of control, the more the testing that would have to be done.

It is clear from the list of documents provided by Friedman/Amos that McDow's analysts did not perform any of the above steps during their review. Therefore, it was not possible for them to determine what error(s) exist in the accounting records of my estate, and it makes Mcdow's review unprofessional and suspect.

Further, while the Summary does not describe the responsibilities of McDow's analysts, it does show that neither McDow nor his analysts addressed the inconsistencies and discrepancies outlined in the Kemplin Report. McDow did not contract the Kemplin Group or me to discuss those inconsistencies and discrepancies. McDow did not even notify us that he was performing a "review" of my estate's books and records. I had to discover that a "review" had been performed through a Freedom Of Information Act request. Lastly, McDow has never issued a formal report of his findings.

---

[4] If the person who collects the cash can also record the cash receipts and write-offs, that person can steal the cash and write off the adjustment. This is exactly the scenario that Friedman set up. He collected the cash, and he made adjustments. In the Kemplin Report, Cynthia Kemplin quoted Michael F. Atkinson, who represented himself as the "Amos employee liaison to the Kemplin team," as stating that "he would initiate 'Accounts Receivable/Accounts Payable swap' transactions routinely *via* telephone calls from Mr. Friedman (Kemplin Report, Attachment Number 1 to Affidavit of Cynthia Kemplin).

[5] Friedman maintained complete control over the disbursements. He wrote the checks, signed the checks, and controlled the write-offs.

First National Bank Account

Friedman provided account numbers for each of the other bank accounts listed in his Monthly Operating Reports

(Commercial and Farmers Bank, account number's 1014872603, 1014915503 and 4010797503; Maryland National Bank, account number's 3822632 and 1030444), except for the First National Bank of Maryland bank account. In the list of "Bank Statements" (Exhibit R, page 7), Friedman provided to McDow's analysts, the First National Bank of Maryland bank account is not listed as one of Friedman's bank accounts. Therefore, it is quite possible that McDow's analysts did not know of this account. Further, it is also possible that the "Copies of all bank statements" (Exhibit R, page 6, item 3) provided by C.W. Amos to McDow's analysts did not include the bank statements for the First National Bank of Maryland bank account if it does exist.

On November 19, 1997, I served a subpoena on each bank listed by Friedman in his Monthly Operating Reports, and requested copies of the bank statements for each specific bank account. By letter dated December 4, 1997 (**Exhibit S**), Marcella L. Charles, Legal Assistant at First National, advised me that First National Bank had been unable to locate any account under the several possibilities listed on my subpoena. The possibilities I listed included Friedman's name, social security number, the F.I.N. number he used on the other bank accounts, and the name of Friedman's law firm, Piper and Marbury. By letter dated December 20, 1997 (**Exhibit T**), I asked Friedman to provide the account number to me, but Friedman refused to provide it.

Friedman maintained six different bank accounts in my estate, when one would have been adequate, and he made many undocumented wire transfers between these accounts which the Kemplin Review Team was unable to trace. My efforts to determine the extent of Friedman's wire transfers are stymied because I do no have bank statements from the First National Bank account.

Friedman's failure and refusal to provide an account number for the First National Bank account, and the First National Bank being unable to find such an account, infers that this account does not even exist. Friedman's showing of money transferring through this seemingly nonexistent account implies that Friedman has committed fraud.

Discrepancies in Checks

Attached to the Monthly Operating Reports filed by Friedman is a list of the checks and wire transfer for each reporting period. I posted those checks and wire transfers on a spreadsheet and found that they total $16,458,507.94 (**Exhibit U-V**). The cumulative totals of the checks and wire transfers listed in Friedman's Monthly Operating Reports, under "Total Cash Receipts," is $16,152,427.85, a discrepancy of $306,080.09 ($16,458,507.94 minus $16,152,427.85 equals $306,080.09).

Total Discrepancies

On December 14, 1994, I performed an analysis of the Sales and Receipts shown in the Monthly Operating Reports filed by Friedman for the reporting period October 9, 1992 through July 31, 1994. Recently, I updated this analysis to include the period August 1, 1994, through March 31, 1995 (**Exhibit W**). The actual dollar values listed in Friedman's Monthly Operating Reports for the period commencing October 9, 1992 and ending March 31, 1995 show unposted Cash Receipts of $1,804,252.63.

The unreported Cash Receipts of $596,532.02, unrecorded sales of $173,263, unposted checks of $306,080.09 and unapproved adjustments, credits, write offs, and swaps of $789,394, total another $1,865,269.11.

Therefore, as best as I can determine from the accounting provided in the Monthly Operating Reports filed by Friedman, and the analyses of that accounting by Friedman/Amos, the discrepancies in the accounting of my estate's assets during the $2^1/_2$ years Friedman filed Monthly Operating Reports total $3,669,521.74.

Lack of Final Account

Friedman has not filed any accounting of my estate's assets since May 2, 1995 (for the period ending March 31, 1995), a date over four years ago, nor has he filed a final account of my estate's assets. The Monthly Operating Reports Friedman filed for the period commencing October 9, 1992, and ending March 31, 1995, as shown above, are full of errors, inconsistencies, and discrepancies, and they

show that over 3.5 million dollars of my estate's assets are missing through March 31, 1995. Since Friedman has not filed any accounting for the period April 1, 1995 to the present, and since Friedman has not filed a final account of my estate's assets, the total amount of missing assets cannot be fully determined.

In closing, in our telephone conference of August 18, 1999, you stated to me that, because of the large discrepancies in the accounting of my estate, an investigation is in order. In light of the many discrepancies and inconsistencies I have outlined above, I believe you will concur that both an investigation and a fraud audit are in order.

Sincerely,

Fred Allnutt

EXHIBIT 2

Fred W. Allnutt, Sr.
10370 Baltimore National Pike
D-130, Suite 605
Ellicott City, MD 21042
Phone # 410-984-6476

August 27, 1999

Kevyn D. Orr, Deputy Director
Executive Office for Unites States Trustees
Department Of Justice
901 E Street, NW, Suite 700
Washington, DC 20530

Re : Case No. 92-5-7401, U.S.B.C., D. OF Md.

Dear Mr. Orr:

The purpose of this letter is to supplement my August 23, 1999 letter by bringing two additional issues to your attention. The first issue I will present is the current status of the books and records pertaining to my estate. The second issue I will present is the sale of certain assets of my estate, known as the "Race Car Assets," for a fraction of their estimated value to an "insider."

Books and Records

On October 22, 1998, the panel trustee administering my estate, Mark J. Friedman, filed an Application For Final Decree To Close Bankruptcy Case Of Fred W. Allnutt, Sr. (Docket Number 698). Even though I was listed on the

Certificate Of Service, Friedman did not send a copy of his Application to me. I learned of its filing after I received the bankruptcy court's Order Constituting Final Decree To Close Bankruptcy Case Of Fred W. Allnutt, Sr. (Docket Number 704) on December 8, 1998. Among Friedman's many "requests," Friedman requested the bankruptcy court to "...authorize the Chapter 11 Trustee (him) to dispose of his books and records relating to the bankruptcy case..." (page 3, ¶ 3, item (vii)).

Shortly after I received the bankruptcy court's Order, I filed a Motion To Alter Or Amend (Docket Number 705), and ask the court to allow me to retrieve all of the books and records relating to my estate. Friedman objected to my Motion (Docket Number 706) and I responded (Docket Number 709). My arguments against the destruction of any of my estate's books and records are:

- ⇒ Friedman and his law firm failed to disclose some fifty-six connections with the creditors and customers of my estate, most of which represented serious conflicts of interest.
- ⇒ Friedman and his law firm filed false verified statements stating that they had no connections or conflicts of interest.
- ⇒ Friedman and his law firm started representing numerous creditors and customers of mine after I filed for bankruptcy, creditors and customers that Friedman became privy to through his administration of my bankruptcy.
- ⇒ Friedman and his law firm accepted payment for services rendered to creditors and customer of mine while failing to collect money due my estate from these same creditors and customers.
- ⇒ Friedman and his law firm were General Counsel for Ryland Homes, a large customer of mine when I filed

bankruptcy, and Andre W. Brewster, who is a partner in Friedman's law firm, served as Ryland's Chairman of the Board of Directors, which represents a very serious conflict of interest. Friedman did not disclose this connection, a connection he

continued to maintain after he became trustee of my bankruptcy, and wrote off thousands of dollars of Accounts Receivable to Ryland without court approval.

⇒ Friedman's law firm was Bond Counsel for the Maryland Comptroller, another creditor in my bankruptcy.

⇒ Friedman sold two building lots I owned at prices well below market value to Ryan Homes, who was both a customer of mine and a client of Friedman and his law firm.

⇒ Friedman employed his law firm as his attorneys and assumed the roll of lead attorney in my bankruptcy. Friedman billed my estate millions of dollars for attorney work, much of which was trustee work, and then billed my estate a second time for trustee work.

⇒ Friedman and his law firm had familial connections with the IRS, my largest creditor. Herbert Seidman, who is the District Director of the IRS, has a son, Lawrence R. Seidman, who is a member of Friedman's law firm, and assistant District Counsel for the IRS, Elizabeth Henn, IRS counsel in my bankruptcy case, is married to William Henn, another member of Friedman's law firm;

The bankruptcy court denied by Motion To Alter or Amend and I have appealed to the District Court for relief. My Appeal Brief is attached as **Exhibit 1**.

Because of my appeal, the bankruptcy court's order granting Friedman permission to destroy my estate's books and records is not final. However, I believe that it would be prudent for you to immediately take possession of all of my estate's books and records. This should include all accounting records, however incomplete they may be that are in the possession of Friedman and his accounting firm, C.W. Amos.

Race Car Assets

In various pleadings and motions Friedman filed in my bankruptcy case, he identified the Race Car Assets as:

⇒ "race car" (Adversary Proceeding # 93-5146-JS, Docket # 7, page 7 ,line 23);
⇒ "All-aluminum car trailer and contents" (Main case # 92-5-7401, Docket 279, page 4, lines 6 & 7);
⇒ "two engines and certain tools and accessories" (Main case # 92-5-7401, Docket 279, page 4, lines 7 & 8);
⇒ "race car transmission" (Main case # 92-5-7401, Docket 279, page 10, line 1);
⇒ "hydraulic lift" (Main case # 92-5-7401, Docket 279, page 4, line 6);
⇒ "salamander heater" (Main case # 92-5-7401, Docket 279, page 4, line 6);
⇒ "air compressor" (Main case # 92-5-7401, Docket 288, page 2, line 2);
⇒ "a graduated set of three Snap-On brand tool boxes" (Main case # 92-5-7401, Docket 288, page 2, line 3 & 4):

⇒ "extensive array of tools" (Main case # 92-5-7401, Docket entry 279, page 4, lines 11-12);
⇒ "expensive precision tools" (Adversary Proceeding # 93-5146-JS, Docket #7, page 8, line 5);
⇒ "tools used for the race car" (Adversary Proceeding # 93-5146-JS, Docket #7, page 8, line 8);
⇒ "other similar tools" (Adversary Proceeding # 93-5146-JS, Docket #7, page 8, line 9);

⇒ "payments in cash and by check" (Adversary Proceeding # 93-5146-JS, Docket #7, page 8, line 13);
⇒ "household items, hand tools, furniture, jewelry, payments of household expenses, mortgage payments, utility payments, insurance payments" (Adversary Proceeding # 93-5146-JS, Docket #7, page 7, line 24);
⇒ "truck" (Adversary Proceeding # 93-5146-JS, Docket #7, page 7, line 24);
⇒ "tools removed from the business premises" (Adversary Proceeding # 93-5146-JS, Docket #7, page 8, line 23).

Friedman, in his "Motion By Chapter 11 Trustee For Authority To Enter Into Settlement Agreement And Approval Of Compromise Of Claims Between Chapter 11 Trustee And Charles Kevin Evans[1] And Donna Marie Evens" (Docket # 279), specifically the "Settlement Agreement" attached thereto, on page 4, ¶ L., states that Stephen L. Wilcoxon, of Atlantic Auctions, Inc., had valued the race car assets in "a cumulative amount not less than $200,000."

On March 3, 1994, Friedman filed a Notice of Private Sale of Certain Race Car Assets by Mark J. Friedman, Chapter 11 Trustee, to Metro Recovery, Ltd. (Docket #288), but he did not file the Agreement of Sale between him and Metro Recovery. Friedman did not provide a service copy of his Notice of Private Sale to me and I was, therefore, unaware of its existence until after the time for objecting had expired. In his "Notice," Friedman failed to disclose that the Race Car Assets were being sold to an "insider," Charles Lewis Jr., the District Manager for Miller & Miller Auctioneers, Inc., the company to whom Friedman sold over seven million dollars of my assets.

Friedman did not disclose, pursuant to Rule 2014, that the purchaser of the Race Car Assets, Metro Recovery, Ltd., is a company owned and operated by Lewis Friedman, in an obvious attempt to further hide the identity of the purchaser, did not type Lewis' name under the signature line on the Agreement of Sale (**Exhibit 2**). In lieu of Lewis' name, Friedman typed, under the signature line, "Its Duly Authorized Representative" when he knew that Metro Recovery's only "Duly Authorized Representative" was Lewis. Friedman did, however, put his own name under his signature line.

Friedman also failed to comply with Bankruptcy Rule 6004, Use, Sale, or Lease of Property, specifically rule (f), Conduct of Sale Not in the Ordinary Course of Business. Rule 6004 (F) (1) states:

> (1) **Public or Private Sale**. All sales not in the ordinary course of business may be by private sale of by public auction. Unless it is impracticab'e, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of the sale. If the property is sold by an auctioneer, the auctioneer shall

file the statement, transmit a copy thereof to the United States trustee, and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and transmit a copy thereof to the United States trustee. (Underline added).

---

[1] Charles Kevin Evans was an employee of mine.

Friedman did not file the required Rule 6004 (F) (1) "itemized statement" showing the property sold, the name of the purchaser, and the price received for the property that Rule 6004 requires that he file "on completion of the sale." As you will see, infra, Friedman has surreptitious reasons for not filing the required Rule 6004 (F) (1) "itemized statement."

On August 25, 1994, I deposed Lewis. The full transcript of this deposition is in the Court record, being entered by me during a September 19, 1994, hearing regarding Friedman's 5th interim compensation request. I have, however, attached the pertinent pages (**Exhibit 3**) to this letter. Lewis' testimony indicates that Lewis, Friedman, and Wilcoxon committed criminal acts in the sale and purchase of the "race car assets." Consider the following testimony:

a) Lewis testified that he only received a portion of the "race car assets" identified by Friedman in the various pleadings and motions he filed in my bankruptcy case, and that the race car engine, the race

car transmission, major components of the race car, and all tools (except for four or five combination wrenches), the truck, household items, furniture, jewelry, and other items were not provided to him by Friedman (Exhibit 2, page 61, lines 5-24, page 62, lines 20-24; page 63, lines 17-24; page 64, lines 1-12; page 55, lines 16 & 17).

b) Lewis testified that, except for the Gold Rush trailer, he did not know if the race car assets he receive were the same assets that were delivered to Atlantic Auctions by Evans because "there were no identifying marks on any of the items he received" (Exhibit 2, page 56, lines 3-14, page 61, lines 14-24; and, page 62, line 1).

c) Lewis testified that he purchased the race car for $6,000.00 to $7,000.00 and sold it for $18,000.00; that he did not have a bill of sale, was paid by check that he deposited in the Metro Corporate checking account; and, that he could not remember the name, address, or phone number of the purchaser (Exhibit 2, page 54, line 7; page 68, lines 7 & 8; page 65, lines 5 & 6; page 65, lines 5 & 6, page 54, lines 7 & 8; page 54, lines 7 & 8; page 54, lines 7 & 8; page 65, line 10; page 64, lines 18 & 19; page 65, lines 3 & 4; page 67, lines 19 & 20; and, page 67, lines 21 & 22).

d) Lewis subsequently retracted his testimony that he had received a check in payment for the race car and testified that he had received cash instead, but that he did not know who took the cash (Exhibit 2, page 74, lines 18-22, page 75, lines 19 & 20).

e) Lewis testified that Mark Friedman told him he was to pay the price of $28,000.00 for the assets (Exhibit 2, page 54, lines 6-16).

f) Lewis testified that he gave the graduated set of three Snap-On tool boxes to Kevin Evans in return for allegedly performed on a "dump truck" that he

(Lewis) did not own (Exhibit 2, page 69, lines 12-24; page 70, lines 1-7; page 70, line 23; page 71, lines 1-6).

g) Lewis testified, regarding the Snap-On Tools, that he only received a couple of hand tools, a battery tester, a battery charger, and four or five combinations wenches (Exhibit 2, Page 62, lines 2-22).

Lewis testified that he paid $28,000 for assets that had a total value of $26,000 (Exhibit 2, page 54, lines 1-24, and page 55, lines 1-13). It is inconceivable that Lewis would pay $2,000 over what he knew the Race Car Assets to be worth unless there were other behind the scene agreements to hide what really happened to the Race Car Assets and who was to receive the money.

Lewis testimony develops a pattern of suspicious activity that cannot be condoned. One can only conclude that fraud and deception was committed upon the bankruptcy court, my estate's creditors, and myself. Likewise, Friedman's failure and refusal to account for the sale of the race car assets, and especially those that were not turned over to Lewis, cannot be condoned. It is very suspicious that the Race Car Assets were placed in the care, custody, and control of Wilcoxon (the person who valued them at $200,000) and then many of those assets mysteriously disappeared and their value decreased to $28,000.

In my September 28, 1994, telephone conference with Joseph Bellinger, a Piper and Marbury attorney working with Friedman, I learned that Wilcoxon took both still and movie pictures of all the Race Car Assets prior to Friedman taking possession, and that he also made a detailed listing of

those assets. Bellinger confirmed that Friedman had these pictures and listings in his possession (**Exhibits 4 & 5**), yet they have not been made available to either the bankruptcy court or me.

All this further supports my claim that Friedman and others committed fraud against my estate, the bankruptcy court, and me. In additional to millions of dollars of cash being misappropriated and perhaps embezzled by Friedman, Lewis' testimony indicates that assets belonging to my estate were stolen. Hundreds of thousands of dollars of Race Car Assets are missing--a race car valued in excess of $100,000 has allegedly been sold to Lewis for $6-7,000 and then resold for $18,000 in unaccounted for cash to an unknown party. The race car engine, the race car transmission, major components of the race car, and all tools (except for four or five combination wrenches), the truck, household items, furniture, jewelry, and other items were not delivered to Lewis by Friedman. These and other Race Car Assets just disappeared with no accountability. Other Race Car Assets were sold below their market value. This whole issue regarding the Race Car Assets seeks of secret deals, fraud, and thievery.

Further, Friedman charged my estate over $65,000 in legal fees concerning the turnover and sale of the Race Car Assets which only gained my estate $28,000. This represents a net loss to my estate of $37,000 without even considering the thousands of dollars Wilcoxon's charged my estate.

Conclusion

The law presumes that all officers entrusted with the duty and responsibility to uphold the law will execute their duties and responsibilities lawfully. This is especially true when an officer has virtual unlimited discretionary power, as is the case here with Friedman. However, any presumption

in favor of the validity of Friedman's actions does not apply when the facts infer beyond all reasonable doubt that he has violated the law and my personal rights, and deprived of my property in an illegal and willful manner.

I look forward to hearing from you shortly.

Sincerely,

Fred Allnutt

EXHIBIT 3

EXTRACT OF AFFIDAVIT AND TRANSCRIPT
OF HEARING Sept. 19, 1994

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

In re: FRED W. ALLNUTT, SR.	*	Case No. 92-5-7401-JS
	*	
Debtor.	*	Chapter 11
	*	

* * * * * * * * * * * *

AFFIDAVIT OF FRED W. ALLNUTT, SR.
IN SUPPORT OF DEBTOR'S MOTION TO REOPEN CASE
AND FOR WRIT OF MANDAMUS

I, Fred W. Allnutt hereby affirm that I am a competent adult of at least 18 years of age and declare the following to be true:

1. That I am the debtor in the above captioned case.
2. That attached hereto is a copy of the hearing of September 19, 1994 (**EXHIBIT 1**).
3. That, at this September 19th hearing, I informed this court and the trustee, Mark J. Friedman, of various improprieties with the monthly operating reports Friedman filed in my bankruptcy case.
4. The following is the pertinent portion of the September 19, 1994, hearing starting on page 97, and ending on page 100:

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16 THE WITNESS: There is $600,000 missing by the
17 financial statements.
18 THE COURT: You can just sit down at the counsel
19 table, Mr. Allnutt. I'm not going to hear from you anymore.
20 I hope I get through to you today, Mr. Allnutt. I don't
21 believe you, and I don't choose to hear from you anymore
22 with respect to any of these matters that you're bringing to
23 me. Do you have anything final to say?
24 MR. ALLNUTT: I understand because you look at it
25 from one perspective, sir, and I can't help that.

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1 THE COURT: Yes, the legal perspective,
2 Mr. Allnutt. I'm looking at it from the legal perspective.
3. THE WITNESS: I understand that.
4. THE COURT: What is your obligation as a debtor
5. under the law, which you have obviously failed to
6. appreciate. Is there anything else you want to say?
7. MR. ALLNUTT: I want to bring up the fact that
8. there's $600,000 missing from my estate that's unaccounted
9. for, and I have the documentation to prove it, and I would

like for this Court to take this documentation at this time.

THE COURT: And where is that money?

MR. ALLNUTT: That money -- I don't know where it is. If I knew where it was, I wouldn't have to bring in the documentation.

What this Court has before it is an analysis of monthly operating reports, and if you look at column four, it's the total amount of receivables that are listed in the monthly operating reports at the end of each month, and it gives the period -- not each month but the time period of the report, and we can see that at the end of 10/31, there was $3,078,000. Skipping down to the bottom, right now the last report shows $1,454,000 as yet in the accounts receivable. That's the difference of -- if you look at the bottom of column five -- of $1,624,000, but if you go over

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to column seven -- I'm sorry -- column six, and I've added every check by his cash receipts register with his -- not my

numbers -- but Mr. Friedman's numbers, and I've taken every
check that was received which he has totaled, and that's the
money he has posted as being received. Now, if you look at
11/1 to 12/31, the value of the receivables at that time was
$5,028,000 That means on column five they dropped
$550,000, yet he only shows cash receipts of $431,000, and
this receivable is not accounted for of $119,000, and that
scenario continues right on down through when you see on
June the 30th. And these are the documentation's before this
Court. This is just a summary. This is not my doings. I
didn't create this, I just took it from his document. I
didn't create these numbers, I created this document. I
made this document but we can see in June, there's a
$182,000 missing. There's only $66,000 that came in and
begs the question, how did the receivables decrease by
$249,000? I see no write-offs within the financial
statements, and I have seen no motions before this Court to
write off any bad notes, so I present that to this Court as

21. a very big problem. It has nothing to do with me, it has a
22. whole lot to do with money, and it has a whole lot to do
23. with the estate, and there's definitely something wrong.
24. THE COURT: That's it. I've heard enough. I am
25. going to approve this settlement, I'm going to approve the

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1. fee in the full amount. Thank you. That will conclude the
2. hearing